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BANTOE-APPÈLHOWE

1968

REPORTS

OF THE

BANTU APPEAL COURTS

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SOUTHERN BANTU APPEAL COURT.

FRANK SAULI v. ROGERS TOTO.

B.A.C. CASE No. 7 of 1968.

King William's Town: 11 June 1968, before O'Connell, President, and Adendorff and Warner, Members of the Court.

BANTU CUSTOM.

XHOSA AND FINGO CUSTOM.

Guardianship—illegitimate child of spinster—no fine paid by natural father—mother subsequently lobolaed by another man at whose kraal child is brought up and maintained—failure of heirs in mother's family.

Held (after consulting Xhosa and Fingo assessors): The child becomes a member of the kraal where it has grown up and been maintained and the head of that kraal, i.e. the mother's husband, becomes its guardian and, if the child be a female, the person entitled to dowry or fines paid in respect of her.

Appeal from the Court of the Bantu Affairs Commissioner, Port Elizabeth.

O'Connell, President (delivering the judgment of the Court):—

The Plaintiff appeals against the judgment of the court *a quo* upholding the Defendant's plea that the Plaintiff has no *locus standi* to bring the action and accordingly dismissing the summons with costs.

The Defendant adduced no evidence and closed his case after the evidence for the Plaintiff had been heard.

The evidence establishes that the Plaintiff's wife by Bantu custom, Florence, when an unmarried girl, was seduced and rendered pregnant by one Mboya and as a result gave birth to a girl, Muriel. Mboya paid no damages to Florence's father, Koos, with whom she was living, and also paid no maintenance for the child. He is reported to be dead but his death is not proved. He has, in any event, never seen Muriel and has shown no interest in her. Muriel is now 24 years old and unmarried. When Muriel was a child of three to four years, Koos handed over Florence in marriage by Bantu custom to the Plaintiff and received from the latter five head of cattle as lobola. At the same time he also handed over Muriel to the Plaintiff to care for because he (Koos) was, on account of his age, unable to do so. The Plaintiff has since then had Muriel in his custody and has brought her up and maintained her. Koos and his wife are both deceased and their only son died in or about September 1967. The son had no male issue and is survived by a daughter. There are no male relatives of Koos extant. During 1965 the Defendant seduced and rendered pregnant Muriel who subsequently gave birth to a child. He paid R20 to the Plaintiff as part-payment of the R100 (or five head of cattle) demanded by the latter as the customary fine for the seduction and pregnancy but now refuses to pay the balance because he says the Plaintiff has no *locus standi* to sue for damages in respect of Muriel.

The judicial officer says in his reasons for judgment "the Court dismissed the action for the reason that the natural father has the right at any time to claim the child on payment of customary fine and "isondlo"—vide *Lupindo v. Bonja* 4 N.A.C. 51 (1921) and *Mayeki v. Qutu* 1961 N.A.C. 10 (S) or alternatively that the illegitimate child Muriel belongs to the house of her mother's family—vide *Ndella v. Butelezi* 1941 N.A.C. (N & T) 38 and *Paponi v. Mpakayi* 3 N.A.C. 241 (1912)". But this approach is wrong. In the first place, the fact that her natural

father has the right to claim Muriel on payment of the customary fine is completely irrelevant to the question as to whether, in the circumstances of the case, the Plaintiff has become her guardian and, as such, vested with the property rights in her. Secondly, when regard is had to the failure of heirs in Florence's family, the alternative reason for dismissing the action is also unsatisfactory in that it begs the question.

Were there an heir in Florence's family no difficulty would arise because, in the ordinary course of Bantu custom, Muriel would belong to such heir and the Plaintiff's marriage to Florence would *per se* not confer upon him any rights in Muriel—*Luhleko v. Langeni* 3 N.A.C. 122. But here there is a failure of heirs and nowhere in the law reports or in any work of reference is the question as to who in such case is the guardian of the child dealt with or even mentioned. The matter, being *res nova,* is submitted to the Xhosa and Fingo assessors who unanimously and unhesitatingly state (their answers are appended) that in the circumstances of this case the child becomes a member of the kraal of her mother's husband where she has grown up and been supported and that the mother's husband is the child's guardian and entitled to any dowry or fines paid for her. This Court accepts this expression of opinion as correctly setting forth the Xhosa and Fingo custom on the point and also as being in accord with the dictates of common sense and equity.

The appeal is accordingly upheld with costs and the judgment of the Court *a quo* is altered to read " For Plaintiff as prayed with costs ".

STATEMENT BY BANTU ASSESSORS.

Assessors in attendance:

1. E. Nkontso, Xhosa assessor from King William's Town District.

2. G. Kalipa, Xhosa assessor from King William's Town District.

3. H. Vazi, Xhosa assessor from King William's Town District.

4. B. Dotwana, Fingo assessor from King William's Town District.

5. E. Mnyanda, Fingo assessor from King William's Town District.

6. N. Moyikwa, Fingo assessor from King William's Town District.

Question by President:

It has been held by this Court that, if the natural father fails to pay the customary fine and isondlo, the illegitimate child of a spinster belongs to the latter's father or, if he be deceased, to his heir, and, should the spinster marry a man other than the child's natural father and take her child to her husband's kraal where it grows up and is maintained, the property rights in the child do not vest in her husband but remain vested in her father or his heir. What is the position, according to your custom, where the spinster's father dies and is survived by no male relatives, i.e. where there is a failure of heirs in his family? Who then becomes the child's guardian?

E. Nkontso (on behalf of the Xhosa assessors):

If the seducer pays the damages and the isondlo beast the child is his. If he does not pay the child belongs to its grandfather, i.e. the girl's father, until death. If the grandfather dies and leaves no male relatives, the child belongs to the kraal where she has grown up with her mother and the man who married her mother now becomes her father and guardian and nobody but he can claim dowry or damages for her.

B. Dotwana (on behalf of the Fingo assessors):

Our custom is exactly the same.

All agree.

Adendorff and Warner, Members, concurred.

For Appellant: R. Radue, instructed by M. H. Miltz, Port Elizabeth.

For Respondent: No appearance.

NORTH-EASTERN BANTU APPEAL COURT.

LAWRENCE MNGOMEZULU v. CECIL WASHINGTON MKHIZE.

B.A.C. CASE No. 81 OF 1967.

Eshowe: 17 January 1968: Before Yates, President and Colenbrander and Swemmer, Members of the Court.

Lobola—return of—proof of basis for refund—recusal of judicial officer—bias.

Summary: Plaintiff sued Defendant for the refund of lobola after his civil rites marriage with the latter's sister had been dissolved on the ground of his desertion of her and the Bantu Affairs Commissioner entered judgment for Defendant. The Commissioner accepted the Bantu Divorce Court's decree as sufficient proof that Plaintiff was in fact the deserter. The Commissioner refused to recuse himself on Plaintiff's application.

Held: That the Bantu Divorce Court's decree was proof that a divorce had been granted on the ground of desertion but was not proof of the facts on which that Court's judgment was based.

Held: That the evidence recorded justified an absolution judgment.

Held: That there was no evidence of bias on the part of the Commissioner and that he correctly refused to recuse himself.

Cases referred to:

Hanisa v. Ngodwana 5 N.A.C. 49 (1927).

Masoka v. Mcunu 1 NAC. (N.E.) 327 (1951).

Qotyana v. Mkhari 1938 NAC. (N. & T.) 192.

Works referred to:

"S.A. Law of Evidence" by Hoffmann.

"Principles of Native Law and the Natal Code" by Stafford and Franklin.

Appeal from the court of the Bantu Affairs Commissioner, Ingwavuma.

Yates, President:

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Defendant (now Respondent) with costs in an action in which Plaintiff (now Appellant) sued him for the return of 11 head of cattle or their value R220 which he stated he had paid to Defendant as lobola for the latter's sister Constance. He alleged further that he had been married to Constance by Christian rites and that a decree of divorce had been granted on 3 October 1966 by the Bantu Divorce Court. There were four children of the mariage.

Defendant pleaded that 9 head of cattle only had been paid and that Plaintiff was not entitled to their return.

Defendant has noted an appeal but the only relevant portion thereof is that the judgment was against the weight of evidence.

At the outset let it be said that there is no indication whatever on the record of any bias on the part of the Commissioner, as alleged by Plaintiff in his grounds of appeal, and the Commissioner was correct in refusing to recuse himself.

It is trite law that any dispute about dowry paid in connection with a marriage whether contracted according to civil rites or Bantu custom must be dealt with under Bantu Custom—see *Hanisa v. Ngodwana* 5 N.A.C. 49(1927) and furthermore the number of cattle to be returned, if any, by the father or guardian of the woman, rests upon the issue whether the husband had wilfully deserted his wife or she had wilfully deserted him. *Masoka v. Mcunu* 1 N.A.C. (N.E.D.) 327 (1951).

In the instant case the copy of the divorce order indicated that Constance had obtained a divorce on the grounds of malicious desertion by her husband but the mere production of the divorce order is not sufficient to establish the circumstances of the desertion for, as stated by Hoffmann in his book "S.A. Law of evidence" at page 399, "The general rule is that in proceedings between any parties a judgment is conclusive evidence of the existence of the state of affairs which it actually affects *but no evidence of the facts upon which it is based*".

Furthermore in order to be in a position to decide what number of the lobola cattle, if any, is to be returned the Commissioner must ascertain to what degree the husband was responsible for the breach of contract, for that is the factor which Bantu law takes directly into consideration in deciding whether or not, on the dissolution of the marriage, the husband should have back any of the lobola. There is moreover the question of the deductions permissible under custom—see *Qotyane v. Mkhari* 1938 N.A.C. (N. & T.) 192 and pages 140/1 of "Principles of Native Law and the Natal Code" by Stafford and Franklin which set out clearly the various points for attention by a court in deciding a case such as this.

In the instant case the Commissioner has based his decision firstly on the fact that according to the decree the divorce resulted from Plaintiff's malicious desertion but as pointed out above that constitutes proof of the divorce only; and secondly that Constance reported to Defendant that she had been driven away, but his evidence in this regard is not admissible as it is hearsay and must be disregarded; and thirdly that the letter handed into court by Plaintiff and admitted by Defendant to have been in Constance's handwriting supported the fact that Plaintiff had chased her away. However, apart from the fact that there is no direct evidence that she was chased away the main theme of the letter is a complaint against Plaintiff's behaviour and an allegation that he had defamed her. She does state therein that Plaintiff chased her from Swaziland but this is not evidence that she was driven out and Plaintiff has had no opportunity of cross-examining Constance or of putting her allegations to the test.

According to Plaintiff's evidence he lived with his wife in the Ingwavuma district and during 1963 or 1964 obtained employment in Swaziland, visiting his home at weekends. Subsequently he was imprisoned in Swaziland—according to Defendant for a year—and during that time, whilst he could not maintain his family, his wife left him and returned to live with her guardian. He stated that he tried to effect a reconciliation and get his wife to return to him but she refused to do so. The Commissioner did not comment on his demeanour in the witness box nor on the manner in which he gave his evidence and there is no apparent reason why he should be disbelieved.

Defendant's evidence is that Plaintiff took his wife with him to Swaziland and that later Constance and the children returned to his kraal when a report was made to him. He stated that after Plaintiff was discharged from gaol he did come to his kraal but said that he only wanted to see his children and wanted nothing to do with his wife. Defendant gave as his reason for refusing to refund any lobola cattle that Plaintiff had stayed with another woman in Swaziland and had thus caused the break-up of the marriage, but this too is apparently hearsay and no evidence has been brought to substantiate the allegation. For some inexplicable reason Constance was not called to give her version of the affair.

The court is therefore faced with the position that Plaintiff alleged that his wife deserted him and failed to discharge the onus on him to prove this, whereas Defendant alleged that Plaintiff caused Constance to leave him but he (Defendant) failed to make out a case which would entitle him to an outright judgment. There is no preponderance of probability on either side nor does the weight of evidence favour one party more than the other.

In the circumstances and as further evidence may well be available the appeal is allowed with costs and the Commissioner's judgment altered to one of absolution from the instance with costs.

Colenbrander and Swemmer, members, concurred.

For Appellant: In person.

For Respondent: In default.

NOORDOOSTELIKE BANTOE-APPÈLHOF.

MATHEW SIMELANE v. (1) TIMOTHY BEMBE (2) JEREMIAH BEMBE.

B.A.H. SAAK No. 85 VAN 1967.

Pretoria: 15 Februarie 1968, voor Yates, Voorsitter, en Craig en Pieterse, lede van die Hof.

PRAKTYK EN PROSEDURE.

Kapteinshof—verstekuitspraak—versuim om aansoek te doen om tersydestelling—tydperk neergelê bevelend—uitspraak word finaal en beslissend—toekenning van punte nie in geskil nie.

Opsomming: Applikant (Simelane) het versuim om aansoek te doen om tersydestelling van 'n Bantoekaptein se verstekuitspraak volgens die Reëls betreffende Siviele Howe van Kapteins en Hoofmanne. In die Kapteinshof was die vraag van die voogdy, bewaring en beheer van kinders nooit in geskil nie.

Gehou: Dat die tydperk van twee maande neergelê deur Reël 2 (3) bevelend is en dat geen bepalings vir die verlenging daarvan bestaan nie.

Gehou: Dat weens sy versuim het applikant sy reg om te appelleer verbeur en dat die uitspraak van die kapteinshof finaal en beslissend geword het.

Gehou: Dat die kaptein se uitspraak betreffende kinders onreëlmatig was.

Gehou: Dat die Bantoe-appèlhof nie gemagtig is om in te meng in die uitspraak van die Kapteinshof nie behalwe deur middel van 'n uitspraak van 'n Bantoesakekommissarishof en kon dus nie, in die omstandighede van hierdie saak, die kaptein se uitspraak vernietig nie maar kon slegs die Bantoesakekommissaris se uitspraak verander deur byvoeging van 'n bevel dat uitvoering van die Kaptein se uitspraak betreffende kinders gestuit word.

Sake waarna verwys is:

Grobler v. Die Landdros, Winburg, 1967 (4) S.A. 423.

Wetgewing waarna verwys is:

Bantoe Administrasie Wet No. 38 van 1927 Art. 15.

Reëls waarna verwys is:

Siviele Howe van Kapteins en Hoofmanne Reël 2 (3), 9 (1). Appèl van Bantoesakekommissarishof, Wakkerstroom.

Craig, Permanente Lid:

Paragraaf (*a*) van Applikant se aansoek van 9 Junie 1967 in die hof *a quo* bevat die knoop van hierdie aangeleentheid. Die bewyslas om te bewys dat hy die vereistes van Reël 2 (3) van Siviele Howe van Kapteins en Hoofmanne nagekom het, het op hom gerus en hy het hom nie daarvan gekwyt nie. In die besonder het hy nie vasgestel dat hy aansoek om tersydestelling van die kaptein se verstekuitspraak binne die neergelegde tydperk gedoen het. Daardie tydperk is bevelend en daar bestaan geen bepalings vir die verlenging daarvan nie.

Mnr. de Wet se voorlegging dat die betrokke howe aangebore regsbevoegdheid het om die neergelegde tydperk te verleng was verwerp. Alhoewel diskresie toegestaan is deur verskillende reëls om tydperke te verleng bv. in verband met neergelegde tydperk om te appelleer, was daar geen voorsiening gemaak, glo bedagsaam, om verlenging van die tydperk neergelê deur Reël 2 (3) supra, toe te staan. Vasklewing aan sulke tydperke was onlangs volgehou deur die Appèlafdeling in die saak *Grobler v. Die Landdros,* Winburg, 1967 (4) S.A. 423.

Applikant (Verweerder) het sy reg om te appelleer teen die kaptein se verstekuitspraak verbeur en alle verrigtinge tot daardie doel in die Bantoesakekommissarishof was onbevoeg volgens die voorbehoudsbepalings van Reël 9 (1) en die appèl moes van die hand gewys gewees het deur die Kommissaris. Die verstekuitspraak van die kaptein, behalwe 'n deel wat onreëlmatig was (sien onder), word dus finaal en beslissend.

In die kaptein se hof was die vraag van die voogdy, bewaring en beheer van die kinders nooit in geskil nie *vide* sy „Skriftelike Verslag" en 'n bevel daaraangaande was onbevoeg en van nul en gener waarde.

Mnr. de Wet het aansoek gedoen om vernietiging deur hierdie hof van die kaptein se uitspraak ten opsigte van die kinders. Al is hierdie hof met wye bevoegdhede beklee ingevolge artikel 15 van Wet 38 van 1927 (Bantoe Administrasie Wet, 1927) die bevoegdhede magtig nie inmenging in die uitspraak van 'n

kaptein nie, behalwe deur middel van 'n Bantoesakekommissaris se uitspraak. Was dit anders, sou hierdie hof nie geaarsel het om daardie deel van die kaptein se uitspraak wat op die kinders betrekking het, tersyde te stel nie.

Volgens paragraaf (*f*) van Applikant se aansoek, supra, is aansoek gedoen om opskorting van uitvoering van die kaptein se uitspraak in verband met die kinders. In die omstandighede het die hof *a quo* fouteer om 'n bevel daaraangaande nie toe te staan nie.

Dit is toelaatbaar om 'n nuwe hofsaak in te stel in verband met die kinders.

Die appèl word van die hand gewys met koste maar die uitspraak van die Bantoesakekommissaris word verander deur die byvoeging van die volgende woorde:—

„Dit word beveel dat uitvoering van die kaptein se uitspraak van 7 September 1965 betreffende voogdy, bewaring en beheer van die minderjarige kinders word gestuit."

Yates, Voorsitter en Pieterse, Lid het saamgestem.

Namens Appellant: Adv. W. S. de Wet i.o.v. mnre. Kleyn & Strydom, Volksrust.

Namens Respondente: Mnr. D. Hill i.o.v. B. Nathan, Volksrust.

NORTH-EASTERN BANTU APPEAL COURT.

KAIFAS HLENGWA v. FANYANA NGCOBO.

B.A.C. CASE No. 97 OF 1967.

Durban: 2 April 1968: Before Yates, President and Craig and Warner, Members of the Court.

BANTU LAW.

EVIDENCE.

Disposition of property—kraalhead—hearsay evidence—admissibility—sisa.

Summary: The most important part of this judgment refers to the admissibility of hearsay evidence regarding dispositions of property by a kraalhead who died shortly thereafter and the reader is referred to the full text of the judgment. The judgment regarding *sisa* was founded on fact.

Works referred to:

"Native Law in South Africa" (2nd ed.) by Seymour.

"South African Law of Evidence" by Hoffmann.

"Principles of Native Law and the Natal Code" by Stafford and Franklin.

Appeal from the Court of the Bantu Affairs Commissioner, Umbumbulu.

Yates, President:

This case emanated from a Chief's Court where Plaintiff (now Respondent) obtained judgment against Defendant (now Appellant) for the return of two head of cattle which he alleged his late

father Bangani had sisaed to Defendant plus two progeny i.e. 4 head of cattle in all. An appeal to the Bantu Affairs Commissioner's court was dismissed with costs and against this judgment Defendant has noted an appeal on the grounds:—

"1. That the judgment is against the evidence and the weight of the evidence.

2. That the learned Bantu Affairs Commissioner erred in finding that the beasts sisaed to Defendant were not house property, and that Defendant was consequently obliged to account in respect thereof to the Plaintiff the general heir to the estate of the late Bangani Hlengwa.

3. That the learned Bantu Affairs Commissioner should have held that Defendant had discharged his obligations under the sisa contract when he accounted to Nhlangano the heir to the junior house.

4. That the learned Bantu Affairs Commissioner, erred in holding that Defendant's admission before the Chief's Court was an unqualified admission of liability towards the Plaintiff, and the learned Bantu Affairs Commissioner should have held, in the light of the wording of Defendant's reply and the explanation contained therein taken in conjunction with the evidence, that the Defendant admitted no more than that he received sisa stock from the Plaintiff's father Bangani."

Mr. Buys, at the outset of his argument contended that all the evidence relating to the alleged disposition of his property by the late Bangani was hearsay and therefore inadmissible as evidence, that it did not fall within the accepted exceptions to the admission of hearsay evidence and that even though its admission had not been objected to in the court *a quo* that was not sufficient to make it admissible. It is doubtful whether this submission is covered by the grounds of appeal although Mr. Buys contended that the first ground was sufficiently wide to cover it. Be that as it may in Bantu law there is no such thing as a "last will" as it is known to the law of the land but a kraalhead may, either while in full health or on his deathbed make a final disposition of his property, the idea lying behind the disposition being to give sons, other than the heir, a modest portion of the property. For a final disposition of his property he must convene a meeting of his relatives and declare his will in their presence—see "Native Law in S.A." by Seymour (2nd ed.) at page 202/3 and the authorities there cited. When a dispute arises after the kraalhead's death the only means of ascertaining his wishes is from the evidence of those present when the disposition was made and in the circumstances of the instant case this corresponds to the exception known to common law that hearsay evidence is admissible in regard to statements made by testators as to the contents of their will—see S.A. Law of Evidence by Hoffmann at pages 296 and 309/10. The evidence in regard to Bangani's disposition of his property was therefore properly admitted.

In the Commissioner's court the Defendant amplified his plea and admitted that a cow and a heifer had been sisaed to him by Plaintiff's father but alleged that they were sisaed on behalf of Bangani's second wife Alzina (born Phewa) of which house Nhlangano was the heir and to whom he had accounted for all the sisa cattle and their progeny. It is clear from the Commissioner's reasons for judgment that he did not regard Defendant's plea in the Chief's court as an unqualified admission of liability and he correctly held that in view of Defendant's admission of the sisa contract the onus was on him to establish the fact that the cattle had been allocated to the late Bengani's second house and did not form part of the general estate.

Defendant led no evidence whatsoever in regard to the terms of the sisa agreement except to state that it was agreed that he should keep the offspring as a reward for his son's services as a herdboy, which to say the least, would be a most unusual stipulation in an ordinary sisa transaction concerning cattle.

In fact he (Defendant) was away working in Durban when the cattle were delivered. He based his defence on the evidence of Alzina who stated that on her marriage to Bangani she was allotted a cow called Bokisi, and that the two sisa cattle are progeny of this beast.

There is no evidence to support her statement and in view of the fact that she and Bangani were divorced in 1940, as was proved by the production of a copy of a decree which indicated that Alzina was the Plaintiff in that action and at the conclusion thereof she was ordered to reside at the kraal of her guardian, it is extremely unlikely that even if there had been an allocation it would have remained in force. It is also improbable that after a lapse of over 25 years Alzina, who had been away working for at least some of the time would still be able to identify the two sisa cattle as being the progeny of the original cow.

Plaintiff stated that in June 1962, on his father's instruction, he took two cows and transferred them to Defendant for the purpose of sisa and his father's instructions were that Defendant's reward for looking after the cattle would be the milk and their services, which is normal procedure in such cases—see Principles of Native Law and the Natal Code by Stafford and Franklin at page 274. His father died in 1963 and on his deathbed called his relatives together and made a disposition of his property allotting three head of cattle and goats to Nhlangano, the heir in that house and a beast and a goat to Bulani, the next son in that house (the four cattle being dowry paid for daughters in that house). The balance of his estate he gave to Plaintiff, his heir in the Great House and instructed him to collect all the sisa stock. This evidence was confirmed by Aaron Hlengwa and Chief Charles Hlengwa who were Bangani's half-brothers and who despite minor discrepancies both agreed on the essentials and no good reason has been advanced why they should have lied hereanent. Charles went on to say under cross-examination that if a milk beast had been allotted to a junior wife it would have been mentioned at the meeting, which is a reasonable assumption. He also stated that those present were asked to speak if they were dissatisfied but they kept quiet and merely expressed their satisfaction and gratitude. Nhlangano was present at this meeting and according to him no mention was made of the sisa cattle then but at a subsequent meeting his father sent for Defendant and in the presence of Plaintiff, Bulani and himself said that the sisa cattle belonged to the lower house. Defendant however was not quite so specific for according to him Bangani said "If and when Alzina and Nhlangano come to collect their cattle they should give you the beast which we had agreed upon for payment of the services of the herdboy". It is unlikely that Bangani would have forgotten to mention the sisa cattle at a meeting called especially to arrange for the distribution of his estate and then subsequently for him to have given directions in regard thereto solely in the presence of those, except for Plaintiff, who would benefit by an amplification of his original awards.

There is some confusion in the evidence as to when Bangani died. According to Defendant he first distributed his property and then went to hospital. Thereafter he returned home and died about three months after the distribution; whereas Plaintiff and his witnesses all state that he died within a week after the distribution which was made on his deathbed. Under cross-examination however Plaintiff stated that his father went to hospital after the distribution but he again stated that death

occurred within a week after the distribution. However, even if Bangani had survived for some time after he had allocated his property it would not assist the Defendant for a kraalhead may at any time subject to certain limitations make a final disposition of his property—see Seymour's " Native Law in S.A. " 2nd ed. at page 202 and the authorities there cited.

The Defendant, in my view, has failed to discharge the onus on him: The cattle were sisaed to him by Bangani and he must therefore account for them to the latter's heir, who is Plaintiff. He cannot escape liability by paying the cattle to Nhlangano.

Mr. Buys also contended that as there was evidence to show that two of the four cattle claimed had died Plaintiff was not entitled to judgment for more than two. However, the point was not raised in the notice of appeal and was therefore not considered.

The appeal therefore is dismissed with costs.

Craig and Warner, Members, concurred.

For Appellant: Adv. J. A. Buys.

For Respondent: Adv. P. C. Combrink.

NORTH-EASTERN BANTU APPEAL COURT.

JOSEPH TWALA v. JANE NGOQO AND NELSON NGOQO.

B.A.C. CASE No. 2 OF 1968.

Durban: 3 April 1968, before Yates, President and Craig and Warner, Members of the Court.

BANTU LAW.

COMMON LAW.

CONFLICT OF LAWS.

Defamation—witchcraft—system of law applicable—liability of husband under Bantu Law.

Summary: Plaintiff sued First Defendant and her husband for damages for defamation in respect of a statement made by the wife. The Commissioner upheld an exception to the *locus standi* of Second Defendant to be sued as he held the view that Plaintiff had framed his summons in such a way as to indicate that he intended to sue under Common Law and that under this system of law there is no remedy.

Held: That where there is an imputation of witchcraft a claim based thereon is essentially a matter to be dealt with under Bantu Law.

Cases referred to:

Mbata v. Ntanzi 1945 NAC. 98 (N.E.).

Matsomotso v. Nqubuli 1938 NAC. (N.E.) 103.

Mtolo v. Poswa 1 NAC. (S.D.) 253 (1954).

Mkize v. Conco 1953 NAC. (N.E.) 226.

Nopanjwa v. Mhlambiso 1954 NAC. (S) 98.

Buthelezi v. Msimang 1964 NAC. (C) 105.

Ex Parte Minister of Native Affairs *in re Yako v. Beyi* 1948 (1) S.A. 399/400.

Umvovo v. Umvovo 1953 (1) S.A. (A.D.) 195 at 201.

Works referred to:

"Principles of Native Law and the Natal Code" by Stafford & Franklin.

"Native Law in S.A." second edition by Seymour.

"A Digest of S.A. Native Civil Case Law" by Warner (paras. 2275 and 2300 *et seqq.*).

Legislation referred to:

"The Natal Code of Bantu Law" sections 44, 132.

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

Yates, President:

Plaintiff (now Appellant) instituted an action against the present Respondents, Defendant 1, a female adult housewife duly assisted by her husband and against Defendant 2 as her husband and guardian, the latter being liable for her delictual acts, for damages of R300. He alleged that on 17 January 1965 First Defendant defamed him by uttering in the presence of Benjamin Mbhele and his wife words in Zulu which being translated into English mean "Do not permit Tshwala to visit your place because he bewitches me" and on 6 February 1965, in the presence of Vilakazi, Malinga and Khoza she said in Zulu "Produce the candle with which you kill me".

The words being understood to convey that Plaintiff is a witchdoctor and that he was endeavouring to kill and/or injure the First Defendant by witchcraft.

R150 was claimed in respect of each alleged defamation and judgment was prayed against the two Defendants, jointly and severally the one paying the other to be absolved.

Second Defendant filed a special plea in bar to the effect that the summons did not disclose a cause of action against him and in the alternative both Defendants denied the allegations.

After argument the Commissioner upheld the special plea of the Second Defendant, with costs, and Plaintiff has noted an appeal against this judgment on the grounds that:—

"1. The Learned Bantu Affairs Commissioner erred in law in dismissing Plaintiff's claim against Second Defendant on the ground that the action fell to be decided under Common Law as defamation is specifically mentioned as an actionable wrong in the Code, and accordingly ought to have been decided under Bantu Law and Custom.

2. The Learned Bantu Affairs Commissioner erred in law in holding that as First and Second Defendants allegedly were married by Christian rites, Bantu Law and Custom was thereby excluded.

3. No evidence was adduced to prove that Second Defendant was an Exempted Native."

In his reasons for judgment the Commissioner has pointed out that if the action is to be decided according to Common Law then a husband is not liable for the delicts of his wife whereas under Bantu Law a woman may be sued, assisted by her husband, and he may be held liable for her delicts in his capacity as kraalhead. He came to the conclusion that in the instant case

the summons was framed in such a way as to indicate that Plaintiff intended Common Law to apply and only when confronted with the special plea did his attorney submit that the action should be tried by Bantu Law and Custom, and furthermore, on the authority of *Mbata v. Ntanzi* 1945 N.A.C. 98 (N.E.) and *Matsomotso v. Mqubuli* 1938 N.A.C. (N.E.) 103 cited by Stafford & Franklin at page 221 paragraph 18 of "Principles of Native Law and the Natal Code", that Common Law applied and not Bantu Law and Custom, he applied Common Law and upheld the special plea. However in Matsomotso's case (*supra*) in which Defendant was sued for damages for defamation in connection with the illegal brewing of beer the Learned President McLoughlin stated "The whole case appears to have been dealt with under Common Law and in this respect it is subject to question as slander is known to Native Law and the claim should have been dealt with under that law for reasons set out in previous judgments of this court. Under that law (i.e. Native Law) it is extremely doubtful if the facts would justify a judgment in favour of Plaintiff for in Native Law slander is restricted to cases of imputation of witchcraft". In Mbata's case (*supra*) dealing with an imputation of witchcraft McLoughlin, President, pointed out that damages for defamation are not known to basic Native Law and went on to say "Section 132 of the Natal Native Code makes provision specifically for claims for damages, importing Common Law, and the decisions based on the relative section take it for granted that it is Common Law that is applied and not Native Law".

These two judgments appear to be mutually inconsistent but there is overwhelming support for the viewpoint that there is a civil action for defamatory statements imputing witchcraft in Bantu Law—see Native Law in S.A. by Seymour second edition at pages 224 and 255. See also the case of *Mtolo v. Poswa* 1 N.A.C. (S.D.) 253 (1954) in which Sleigh, President, stated "It is correct that under Native Law no action lies for defamation of character *unless* the Plaintiff is accused of practising witchcraft". In the case of *Mkize v. Conco* 1953 N.A.C. (N.E.) 226 at p. 227 it was held that an ordinary case of defamation in terms of section 132 of the Natal Code of Native Law is an actionable wrong and the Commissioner in the exercise of his discretion should have applied Bantu Law.

Warner (Acting President) in the case of *Nopanjwa v. Mhlambiso* N.A.C. 1954 (S) 98 at p. 100 stated "there is no action for defamation under Native Law except where there has been an imputation of witchcraft" and quotes authority for this statement and in the fairly recent case of *Buthelezi v. Msimang* d/a. 1964 N.A.C. (C) 105 in which Defendant was sued for damages for defamation for imputation of witchcraft the court was satisfied that the reasons given by the Commissioner for his decision to apply Bantu Law and Custom were sound—see also cases cited in par. 2275 and par. 2300 *et seq.* of Warner's Digest of S.A. Native Civil Case Law.

Now where a matter is actionable under both systems of law then the judicial officer has a discretion which to apply—see *ex parte* Minister of Native Affairs *in re Yako v. Beyi* 1948 (C) S.A. at pages 399/400 and further in the case of *Umvovo v. Umvovo* 1953 (1) S.A. (A.D.) 195 at p. 201 it was held that "although the existence of a remedy under one legal system and not under the other would be a major factor in the exercise of the discretion, it must not be treated as if it were the only consideration, leading automatically to the application of the system providing the remedy. In the circumstances of a particular case justice may best be served by applying the legal system which gives no remedy".

Here, if Common Law is applied, Plaintiff has no remedy for witchcraft is not recognized by the law of the land (see Seymour *supra* at p. 255). But amongst Bantu an imputation of witchcraft

is a most serious matter and may result in the most dire consequences to the person so accused so that any claim based on such an imputation is essentially a matter to be dealt with under Bantu Law and Custom and in my view the Commissioner was wrong in not having done so.

The further question arises, as pointed out by the Commissioner, whether the summons as framed discloses a cause of action against Defendant in that he is not cited as being liable in his capacity as kraalhead but on the ground that as the husband of Defendant 1 and her guardian he is liable for her delictual acts.

Section 44 (3) of the Natal Code contained in Proclamation No. 195 of 1967 provides that "the natural guardian of a married woman is her husband" and section 141 (1) provides that "A guardian is liable in respect of delicts committed by his ward while in residence at the same kraal as himself" and in subparagraph (3) it is stated that "legal proceedings arising out of any delict such as is referred to in subsection (1) may be instituted against either the person committing the delict or such person jointly with his father, guardian or kraalhead as the case may be". This procedure has been adopted here so that no exception can be taken on that score.

The appeal therefore must be allowed with costs and the Commissioner's judgment altered to read "The special plea is dismissed with costs". The case is returned for further hearing.

Craig and Warner, Members, concurred.

For Appellant: Adv. P. C. Combrink.

For Respondents: No appearance.

NORTH-EASTERN BANTU APPEAL COURT.

ALBERT NGUBANE v. JEROME HADEBE.

B.A.C. CASE No. 6 of 1968.

Eshowe: 17 April 1968, before Yates, President and Craig and Otte, Members of the Court.

BANTU LAW.

CHIEFS' COURTS.

Chief's court proceedings—criterion is Chief's written record—woman acting as "keeper" of the kraal—safeguarding kraal property.

Summary: Plaintiff sued Defendant in a Chief's Court for 30 bags of mealies and the return of his son's wife and was awarded judgment for the mealies only. On appeal to the Bantu Affairs Commissioner the judgment was altered to one for Defendant. On appeal to the Bantu Appeal Court Plaintiff stated that his claim before the Chief had included one for trespass and complained that his son's wife had no *locus standi* to enter into a contract which had led to the removal by Defendant of mealies from his kraal.

Held: That the Chief's "written record" is the criterion in respect of the claim in his court and there was no mention of trespass therein.

Held: That circumstances arose in this case in which it was desirable for Plaintiff's daughter-in-law to act on his behalf

Held: That the daughter-in-law was entitled to enter into an agreement of transport with Defendant in order to safeguard kraal property.

Cases referred to:

Ntuli v. Mkanya 1964 N.A.C. 97 (N.E.).

Qolo v. Ntshini (1950) 1 N.A.C. (S) 234.

Rules referred to:

Rules for Chiefs' and Headmen's Civil Courts. (G.N. 2885 of 1951—now R. 2082 of 1967).

Rule 12 (1).

Appeal from the court of the Bantu Affairs Commissioner, Nqutu.

Yates, President:

This case emanated from a Chief's Court where Plaintiff (now appellant) claimed from Defendant (now Respondent) 30 bags of mealies and the return of his son's wife. Defendant's plea was recorded as " I never entered your kraal. I only took the mealies according to your son's wife's instructions and took it to where she said I must take it to ". The Chief gave judgment for Plaintiff for return of the mealies and costs. An appeal to the Bantu Affairs Commissioner's Court by the Defendant was allowed with costs and the Chief's judgment altered to one for Defendant with costs. Plaintiff has now appealed to this Court on the grounds:—

" 1. The learned Bantu Affairs Commissioner erred in holding that there was no claim for entering my kraal without my consent due regard being had to my evidence and the evidence of Motloung. Further Defendant's plea clearly indicates that the claim of tresspass was made in the Chief's Court.

2. The learned Bantu Affairs Commissioner erred in not accepting the evidence of the Plaintiff in preference to the evidence of the Defendant.

3. The learned Bantu Affairs Commissioner erred in law in holding that I was not the guardian of my daughter-in-law in the absence of my son due regard being had to the fact that I am the kraal head wherein my daughter-in-law and my son reside and besides I am also the kraal eye for my son in his absence.

4. The learned Bantu Affairs Commissioner erred in not accepting the evidence that Defendant was responsible for the absence of Plaintiff's daughter-in-law in view of the fact that Defendant did bring Plaintiff's daughter-in-law from Pretoria."

In regard to the first ground of appeal the Plaintiff did not challenge the correctness of the Chief's written record, so that he is bound by his claim as recorded by that Court, which does not include an allegation of trespass. See *Ntuli v. Mkanya* 1964 N.A.C. 97 (N.E.) (nor did he amplify his claim as he could have done in terms of Rule 12 (1) of the Rules for Chief's Courts published in Government Notice No. 2885 of 1951—now No. R. 2082 of 1967).

Plaintiff's son's wife returned before the hearing of the appeal which was therefore properly confined to a decision in regard to the return of mealies.

The evidence on both sides established that Plaintiff's son and daughter-in-law Gladys lived with him at his kraal. His son had gone to Johannesburg and he (Plaintiff) was at Mtunzini leaving Gladys as the only adult at the kraal. She subsequently left and arranged for Defendant to transport the mealies at Plaintiff's kraal to her sister's kraal and paid him for his services. When sued Defendant stated that he had acted in good faith in terms of his agreement with Gladys and indicated that he was prepared to transport the mealies back to where they had come from provided he was paid therefor.

Appellant contended that his daughter-in-law had no authority to enter into such a contract as she was a woman and therefore a minor under Bantu Law. Section 27 (2) of the Natal Code contained in Proclamation No. R. 195 of 1967 provides that a Bantu female is deemed a perpetual minor in law and has generally no independent powers and section 44 (3) lays down that the natural guardian of a married woman is her husband so that in the normal course of events a married female has no right to enter into a contract on her own or anyone else's behalf. However in the instant case Gladys did not act on behalf of her husband but on behalf of her father-in-law and kraalhead as she was residing at his kraal and was the only adult there. There is provision in section 43 (2) of the Code for the appointment of a woman to act on behalf of the kraal-head during his absence provided that the written authority of the Bantu Affairs Commissioner be first had and obtained, which, although it was not done here indicates that circumstances may arise where it is desirable for her so to act; and further in the case of *Qolo v. Ntshini* (1950) 1 N.A.C. (S) 234, where a widow was concerned, it is stated that where a woman is left in charge of the kraal she is in the same position as a "keeper" of the kraal and has implied authority to dispose of assets of little value such as hides, mealies etc. and in case of emergency, especially where it is necessary for the protection and preservation of the property she may even be entitled to sell stock. In the instant case Plaintiff established that he had appointed a neighbour to be the "eye" of his kraal but there is no indication that Gladys or Defendant was aware of this.

Having decided to leave the kraal and there being no adult, as far as she was aware, to leave in charge, Gladys acted bona fide and as a good *mater familias* and took the necessary steps to safeguard kraal property. She paid Defendant to transport the mealies to a place for safe keeping and Defendant merely carried out the terms of the agreement which Gladys was entitled in the circumstances to make with him. He cannot be held responsible for the return of the mealies.

Furthermore Plaintiff failed to establish that he had suffered any damage and his only evidence in this regard was that in previous years he had reaped 30 bags of mealies in cobs.

The appeal is dismissed with costs.

Craig and Otte, Members, concurred.

For Appellant: In person.

For Respondent: Mr W. E. White.

NORTH-EASTERN BANTU APPEAL COURT.

LYDIA SHILI v. WINSTON SHILI.

B. A. C. CASE No. 16 of 1968.

Durban: 3 April 1968: Before Yates, President and Craig and Warner, Members of the Court.

HUSBAND AND WIFE.

Maintenance of deserted wife—proof of liability—quantum—defendant a compellable witness.

Summary: Plaintiff alleged that Defendant had deserted her and sued for and was awarded maintenance. Defendant did not testify though he is a compellable witness in terms of section 4 (1) of Act No. 23 of 1963. The award was set aside and the case remitted for further hearing in regard to the quantum of the award.

Held: That it is the duty of the presiding judicial officer to inquire into all relevant aspects of the case and that he may have to examine and cross-examine both parties.

Legislation referred to:

Maintenance Act No. 23 of 1963.

Sections 4, 5, 7, 8.

Cases referred to:

Pieterse v. Pieterse 1965 (4) S.A. 344 (T.P.D.).

Works referred to:

" S.A. Law of Husband and Wife " by Hahlo.

" Institutes of S.A. Law, Vol. I, The Law of Persons " (8th edition) by Maasdorp.

" Principles of S.A. Law " (5th edition) by Wille.

Appeal from the court of the Bantu Affairs Commissioner, Durban.

Yates, President:

This is an appeal in terms of section 7 (1) (*b*) of the Maintenance Act No. 23 of 1963 against an order made by a Maintenance court for the District of Durban, pursuant to an enquiry conducted in terms of sections 4 and 5 of that Act, requiring the Defendant (Appellant) to pay an amount of R7 monthly to his wife the complainant (now Respondent) for her support.

The complainant and Defendant are married by Christian rites and have three children born of the marriage one of whom lives with complainant. Defendant consented to an order being issued against him for the payment of R5 per month for support of the child, but opposed the granting of an order for the maintenance of his wife.

An appeal has been noted against the order on the grounds that—

" (1) The Appeal is against the evidence and weight of evidence more particularly in that—

(*a*) The Bantu Affairs Commissioner erred in finding that there is a legal liability on the Respondent to support the Complainant;

(*b*) The Bantu Affairs Commissioner erred in making an Order without ascertaining the actual needs of the Complainant and/or the financial position of the Respondent."

Complainant stated that after her marriage in 1964 to Respondent they lived with her husband's parents at 2550 Lamontville. She sometimes lived with her people and eventually when Defendant's father suggested that she go and reside with her people at C. 693 Kwa Mashu as her husband did not support her she went to live there permanently. She last received money from Defendant in 1965 and since then has supported herself and child by working as a domestic servant. She earned R15 a month whilst employed at the Y.W.C.A. and at the time of the hearing of the enquiry i.e. 9 August 1967, was earning R10 a month in a temporary job. Furthermore she stated she was not interested in Defendant or prepared to return to him unless he provided her with a house of her own and she has apparently made no attempt to go back to him, nor he to get her back.

Defendant, who was represented, did not give evidence and closed his case.

There is a common law obligation on a husband to maintain his wife and this duty does not necessarily come to an end if the joint household breaks up. The husband's duty continues if the separation was due to his fault i.e. he deserted his wife or drove her away by his misconduct; but where the break-up is due to the fault of the wife she cannot claim support from her husband—see The S.A. Law of Husband and Wife by Hahlo (2nd Edition) at p. 102/103, Maasdorp's Institute of S.A. Law, Vol. I., The Law of Persons (8th Edition) at p. 28 and Principles of S.A. Law (5th edition) by Wille at p. 100.

The court must therefore decide whether, in the instant case defendant is legally liable to support complainant. The circumstances in which she left her husband are somewhat obscure but her evidence that it was as a result of defendant's lack of support and the difficult circumstances obtaining in the home of her father-in-law has not been rebutted.

It must therefore be accepted that Defendant was the proximate cause of her leaving him.

In enquiries of this nature, moreover, it is the duty of the presiding officer to enquire into all relevant aspects of the case and he may have to examine and cross-examine both parties —see *Pieterse v. Pieterse* 1965 (4) S.A. 344 (T.P.D.) and in this connection it should be noted that the Defendant is a compellable witness vide section 4 (1) of the Maintenance Act although he is protected by section 8 (4) from giving evidence relating to his liability to maintain any other person.

The amount of maintenance, if any, to be paid rests in the discretion of the court and here again details of the income and expenditure of both parties as well as particulars of their commitments and other relevant facts are necessary for a just decision. for maintenance need not be paid to a wife when she is possessed of ample means and the husband's income is limited, see p. 28 of Maasdorp (*supra*), and moreover the wife must show that she is unable to maintain herself out of her own property and earnings. Hahlo (*supra*) at p. 324/5. In this connection it is interesting to note that the various Provincial Acts and Ordinances repealed by the Maintenance Act of 1963 specifically provided that the court must be satisfied that applicant was without adequate means of support before making an order—see Hahlo (*supra*) at page 106/7.

As pointed out by Mr Noren the complainant, in her affidavit which accompanied her claim for support, stated that the needs of herself and her child amounted to R16 a month. She had obtained an order of R5 a month for the maintenance of the child and her earnings were R10 a month so that the order that Defendant should pay R7 a month was not justified. There is insufficient information on record to enable this court to make an order.

The appeal therefore is allowed and the order in regard to maintenance for complainant is set aside. The enquiry is remitted for further hearing in regard to the amount of the award, if any, to be made to the complainant. There will be no order as to costs.

Craig and Warner, Members, concurred.

For Appellant: Adv. D. Noren.

For Respondent: Maintenance Officer J. Khumalo.

NORTH-EASTERN BANTU APPEAL COURT.

DORIS SINGILE v. MICHAEL SABELA.

B.A.C. CASE No. 19 of 1968.

Durban: 4 April 1968: Before Yates, President and Craig and Warner, Members of the Court.

MAINTENANCE.

PATERNITY.

Appeal—time limit—late noting—prospects of success—paternity—onus of proof.

Summary: A maintenance order was granted against Defendant at the instance of Plaintiff. An appeal against the award was noted late and Defendant advanced the excuse that there was a delay in obtaining a copy of the record. Defendant admitted intercourse with Plaintiff but denied that he was the father of the children because of the time factor.

Held: That Defendant's excuse for the late noting of appeal was unacceptable and that he could have appealed on general grounds and amended them later.

Held: That in the light of the time factors introduced by Defendant there was an onus on him to show that his disclaimer of paternity was well founded.

Cases referred to:

Ngcamu v. Majozi 1959 NAC. 74 (N.E.).

S. v. Swart 1965 (3) S.A. 454 (A.D.).

S. v. Jeggels 1962 (3) S.A. 704 (C).

Rex v. Pie 1948 (3) S.A. 1117.

Legislation referred to:,

Maintenance Act, No. 23 of 1963.

Sections 4, 5, 7.

Rules for Maintenance Courts in respect of Bantu Persons (Government Notice No. R. 97 of 22 January 1965). Rule 5 (1).

Appeal from the court of the Bantu Affairs Commissioner, Stanger.

Yates, President:—

Arising from a complaint lodged with the maintenance officer by Complainant (now Respondent) that Defendant (now Appellant) was the father of her two children and had failed to support them an enquiry was held in terms of sections 4 and 5 of the Maintenance Act, No. 23 of 1963, and after hearing evidence the Bantu Affairs Commissioner ordered Defendant to pay maintenance at the rate of R5 per month with effect from the 1st October 1967. Against this decision Defendant has appealed in terms of section 7 (1) (*b*) on the grounds that—

"(*a*) The evidence of the Applicant in such proceedings was unreliable and contradictory.

(*b*) There was no corroboration of the said Applicant's evidence as is required by Law.

(*c*) Judgment was against the Law and the weight of evidence."

The first matter to be considered here is the application for the condonation of the late noting of the appeal. The order was made on 27 September 1967, and the appeal noted on 13 November 1967, whereas subrule 5 (1) of the "Rules for Maintenance Courts in respect of Bantu Persons", published in Government Notice No. R. 97 of 22 January 1965, provided that the appeal must be noted within 21 days of the date of the order appealed against. According to the affidavit which accompanied the application the late noting was due to delay in obtaining a copy of the record but that is no excuse for when he realised that time was running out Defendant could have noted an appeal on general grounds and amended them later—see *Ngcamu v. Majozi* d/a. Zondi 1959 N.A.C. 74 (N.E.).

It remains to enquire whether the appeal has any reasonable prospects of success. The Complainant has pointed out Defendant as being the father of her two children and the Defendant has admitted intercourse which he stated started when Complainant was two months pregnant with the first child and ended about a year before the second child was born. Such an admission immediately creates a presumption that the man is the father and it places an onus on him to prove the contrary. Vide the case of *S. v. Swart* 1965 (3) S.A. 454 A.D. which quoted with approval from the judgment of Rosenow J. in the case of *S. v. Jeggels* 1962 (3) S.A. 704 (C) "The common law is very clear on this point. Grotius states that if a man admits intercourse, the woman is to be believed in her identification of the father, even thouh she has had intercourse with others. Moreover, even if the man protested that the date of intercourse was only a month before the confinement, or as much as a year before the confinement, this could not avail him, as he was not to be believed as to the time he might fix upon in order to free himself . . ." and from the case of *Rex v. Pie* 1948 (3) S.A. 1117 in which Van den Heever, J. P., refers *inter alia* to the authorities quoted above stated "that the effect is to create a presumption that the man pointed out as the father by the mother is in fact the father and that such a presumption can only be rebutted by clear proof (e.g. that the accused was out of the country during the period of gestation; or that he was and is impotent; or by means of a blood test etc.)". In the instant case Defendant has not discharged the onus.

As there is no prospect of success on appeal the application for condonation of the late noting of the appeal is refused with costs.

Craig and Warner, members, concurred.

For Appellant: Mr. A. D. G. Clark.

For Respondent: In default.

NORTH-EASTERN BANTU APPEAL COURT.

HLOMESAKE MASUKU v. ESTINA MASUKU and MAHOVELA KUMALO.

B.A.C. CASE No. 23 of 1968.

Eshowe: 19th April, 1968, before Yates, President and Craig and Otte, Members of the Court.

BANTU LAW (NATAL).
CUSTOMARY UNIONS.
PRACTICE AND PROCEDURE.

Customary union—dissolution—essentials—issues raised in pleadings—issues which are common cause—protector—guardian—refund of lobola—custody of children—citation of parties—notes of progress of proceedings.

The reader is referred to the full judgment below.

Cases referred to:

Tojani v. Koza 1942 N.A.C. (N. & T.) 65.

Huku v. Macokoto 4 N.A.C. 275, (1922) (Warner 4222).

Sorwidi v. Sorwidi 1938 N.A.C. (C. & O.) 19 (Warner 4225).

Ndongeni v. Ngodwana 1 N.A.C. (S.D.) 93 (1949). (Warner 4214.)

Works referred to:

"Principles of Native Law and the Natal Code" by Stafford and Franklin.

"A Digest of S.A. Native Civil Case Law" by Warner. Paragraphs 3390. 3391, 3880—3882, 4214. 4222, 4225.

Legislation referred to:

Bantu Administration Act No. 38 of 1927. Section 15.

The Natal Bantu Code. Sections 59. 76, 78, 83.

Appeal from the court of the Bantu Affairs Commissioner, Nongoma.

Craig, Permanent Member:

In the Bantu Affairs Commissioner's Court Plaintiff (now Appellant) sued the two Defendants (now Respondents). His claim was for dissolution of the customary union which existed between him and First Defendant on the ground of desertion, for custody of the two minor children of the union and for an order against Second Defendant for the refund of lobola cattle.

The Assistant Bantu Afairs Commissioner who heard the case entered a judgment of "Case dismissed with costs".

Plaintiff has noted an appeal to this Court on the following grounds:—

(1) The learned Assistant Bantu Affairs Commissioner erred in holding that the customary union between Plaintiff and Defendant was not proved.

(2) The judgment is against the evidence and weight of evidence.

Defendants prayed for dismissal of the summons for reasons best known to themselves and in which connection see the first sentence of paragraph 3393 of Warner's "Digest of S.A. Native Civil Case Law"—*Tojani v Koza* 1942 N.A.C. (N. & T.) 65.

A more appropriate judgment in the circumstances which the Commissioner found to prevail would have been "The claim is dismissed with costs" which has the effect of one of absolution (see Warner—paragraphs 3390—3391).

The reasoning and procedure of the presiding officer are, regrettably, erroneous and misleading. He is urged to familiarise himself with the decisions of this and other courts and to ensure, in the future, that all his statements are founded on fact.

In any trial of a civil nature he is required to adjudicate upon the issues raised in the pleadings before him and not to wander therefrom vide *Huku v. Macokoto* 4 N.A.C. 275 (1922) and *Sorwidi v. Sorwidi* 1938 N.A.C. (C. & O.) 19 summarised by Warner at paragraphs 4222 and 4225 respectively.

In the instant case it was common cause that Plaintiff and First Defendant were man and wife by customary union and that eleven head of cattle, undoubtedly ten lobola cattle and one Ngqutu beast, had been paid. The pleadings established this and the Commissioner's statement that no evidence was tendered to clear up the matter of the amount of lobola paid was not founded on fact. These facts should have been accepted as established; they were not put in issue by the pleadings and should not have been adjudicated upon.

The Commissioner's statement that Mahovela Khumalo to whom he wrongly referred as "the supposed Second Defendant" was not "cited a Defendant" is not founded on fact. On the face of the summons Estina Masuku d.a. *and* Mahovela Khumalo are shown as being sued as Defendants; paragraph 4 of the "Particulars of claim" states "that Defendant No. 2 is sued as guardian of Defendant No. 1" and, finally, a joint plea was filed by these two persons as Defendants. I find it impossible to envisage what more convincing proof of citation the Commissioner could require. The question of whether Second Defendant was correctly cited as First Defendant's guardian will be dealt with at a later stage.

The Commissioner's attitude towards Second Defendant was inconsistent. If he was found to be not a party to the case it is not understood why, as "Defendant 2" he was given the opportunity to cross-examine Plaintiff. The record of the proceedings is silent as to the stage at which the decision regarding Mahovela's standing was made. "The presiding officer should make notes of the progress of proceedings"—*Ndongeni v. Ngodwana,* 1 N.A.C. (S.D.) 93 (1949) (Warner 4214).

It follows from the circumstances outlined above that the Commissioner erred in dismissing the case because, vide his reasons for judgment, he found (*a*) there was no proof of a valid customary union, (*b*) there was no proof of the amount of lobola paid and (*c*) that Mahovela Khumalo had not been cited as a Defendant, and his order was set aside.

The record was not returned to the Commissioner's court for a fresh judgment as this court was in a position to arrive at a correct judgment on the evidence recorded and did so by virtue of the powers accorded it by section 15 of Act No. 38 of 1927.

The main points in issue were those referred to in paragraphs 7 and 8 of the summons and plea viz. whether or not Plaintiff was entitled to a dissolution on the ground of his wife's desertion [section 76 (*c*) of the Natal Bantu Code] and (*b*) whether there had been attempts at reconciliation [section 78 (3) of the Code].

Other points for attention, whether explicitly placed in issue or not, are guardianship of the woman, custody of the children and the return of lobola cattle vide section 83 of the Code and see "Principles of Native Law and the Natal Code" by Stafford & Franklin, pages 140 *et seqq.*

It is clear that First Defendant has deserted Plaintiff on several occasions. Her alleged pretexts for so doing appear to be trivial and lend weight to the impression that she was not a willing party to the union. Any unwillingness on her part should have been voiced at the time of the celebration of the union vide section 59 (*c*) of the Code and cannot now found a basis for the Commissioner's finding that there was no valid customary union. In her address to this court first Defendant stated voluntarily that she was not opposed to a dissolution.

It is obvious from the evidence of both the main parties that there were several efforts at reconciliation but none of them endured. First Defendant went so far as to say that "My parents had agreed to return the lobola cattle" (see Stafford & Franklin, supra, at pages 134-135).

In my view and apart from First Defendant's concession the points in issue were established in Plaintiff's favour and an order of dissolution was justified.

It is necessary and only possible to comply partly with the requirements of section 83 (*a*) of the Code. Second Defendant is the woman's maternal uncle and, quite obviously, is not her guardian, as such, under Bantu Law but in the light of the regard which she has for him he can only be her protector. Whether or not they live in the same kraal with First Defendant's mother is not clear and in these circumstances it is not possible to give an explicit order as to where she should live. It is, however, possible and justifiable to place her under his guardianship as her protector.

The two female children of the union are little more than infants though there is no absolute certainty as to their ages. One was born shortly before December, 1965 and the other during August 1967. The proper person to have custody of children of such tender years is undoubtedly the mother i.e. First Defendant, in the absence of proof that she is not a fit and proper person to have charge of them (see the cases summarised by Warner at paragraphs 3880-3882).

Section 83 (*c*) of the Code requires that an order be made regarding "the number of cattle, if any, to be returned by the woman's *father* or *guardian* to the husband". Second Defendant who, at most, is only the protector of the woman cannot be required to make any return. As was conceded by Mr. White he is not the "lobola holder". Though he was duly cited as a Defendant he has no *locus standi in judicio* to be sued for the return of lobola being neither father nor guardian of the woman and for that reason that portion of the claim against him attracted dismissal.

Plaintiff may institute fresh proceedings for the return of lobola cattle but such must be against the person who inherited the property rights in First Defendant from her late father.

The appeal was allowed with costs and the Bantu Affairs Commissioner's judgment was replaced by one (*a*) dissolving the customary union with costs against the Defendants, (*b*) placing First Defendant under the guardianship of her protector viz. the Second Defendant (*c*) awarding custody of the minor children to First Defendant until further order (*d*) absolving Second Defendant from the instance in respect of the claim for the return of lobolo.

Yates, President and Otte, member, concurred.

For Appellant: Mr. W. E. White i.b. Uys & Boshoff, Vryheid.

For Respondents: First Respondent in person. Second Respondent in default.

NORTH-EASTERN BANTU APPEAL COURT.

MBULU FAKUDE v. ELIAS NYAWO.

B.A.C. CASE No. 31 of 1968.

Eshowe: 19 April 1968: Before Yates, President and Craig and Otte, members of the Court.

PRACTICE AND PROCEDURE.

Default judgment — rescission — Appeal from Chief's Court — service of notice—appeal to Bantu Appeal Court—late noting—condonation.

Summary: In a Chief's court Plaintiff's claim for damages to crops by Defendant's cattle was dismissed. On appeal to the Bantu Affairs Commissioner's court and in Defendant's absence the Chief's judgment was altered to one in favour of Plaintiff. Defendant's subsequent application for rescission of the default judgment was refused, his statement that the notice of appeal from the Chief's judgment had not been served on him being rejected. Over a year after the refusal to rescind Defendant noted an appeal to the Bantu Appeal Court.

Held: That Defendant's excuse for not noting an appeal timeously was unacceptable as, in effect, his own dilatoriness was responsible.

Held: That Plaintiff's efforts to serve the notice of appeal from the Chief's court complied with the letter and spirit of the relevant rule and that Defendant's intransigent conduct prevented the physical delivery of the notice to him.

Held: That the Bantu Affairs Commissioner was justified in refusing rescission of the default judgment.

Held: That the application for condonation should be refused.

Cases referred to:

Paragraph 437 of Warner's "Digest of S.A. Native Civil Case Law".

Rules referred to:

Chief's and Headmen's Civil Courts.

Rule 10 (2).

Appeal from the court of the Bantu Affairs Commissioner, Ingwavuma.

Yates, President:

This is an appeal from the judgment of a Bantu Affairs Commissioner's court dismissing with costs an application for the rescission of a default judgment. The case emanated from a Chief's court where the claim of Plaintiff (now Respondent) against Defendant (now Appellant) for damages caused to his mealies by Defendant's stock was dismissed. Plaintiff noted an appeal to a Commissioner's court and on 14 July 1966, the appeal was allowed with costs in Defendant's absence and the Chief's judgment altered to one in favour of Plaintiff. On 11 August 1966 Defendant applied for a rescission of the default judgment but this was refused on 27 September 1966. Over a year later, i.e. on 24 October 1967, after a writ of attachment had been

served upon him, defendant noted an appeal against this decision on the ground that there had been no proper service of the notice of appeal from the Chief's Court upon him. He also purported to appeal against the judgment but this, of course, was unnecessary for if he succeeded in his claim for rescission the judgment would no longer be valid.

The first matter to be considered is an application for condonation of the late noting of the appeal. In the affidavit which accompanied his application Defendant stated that after his application for the rescission of the default judgment had been dismissed on 27 September 1966, he went to the office of the Clerk of the Court to ascertain how much he had to pay the Plaintiff but went away without being told as the Clerk of the Court had not yet received the record. He made no mention of any intention at that stage to note an appeal. He did nothing more in the matter until served with a writ of attachment over a year later and stated that he was under the impression that he would receive a letter informing him of the judgment of the Court. This however is not a valid excuse for, knowing that the judgment had gone against him, he must have known that matters could not be allowed to rest there if he was dissatisfied. In any event ignorance of the rules is not a valid excuse—see the numerous cases cited in Warner's Digest of S.A. Native Civil Case Law at paragraph 437.

Furthermore on the merits the Defendant has no prospect of success for Rule 10 (2) of the Rules for Chiefs and Headmen's Civil Courts, published in Government Notice No. 2885 of 1951 (now substituted by Government Notice No. 2082 of 1967) provides that service of the notice of appeal in a Chief's Court may be effected by Appellant by delivery thereof, in the presence of a witness, and the evidence of Plaintiff and his witness Ngisana Gama indicate clearly that this was done and that Defendant refused to accept the notice.

Mr. White contended that the service was not a good one because Plaintiff did not leave the copy at Defendant's kraal. However it is clear that Plaintiff complied with the letter and the spirit of the relevant section and Defendant cannot escape the consequences of his own intransigent conduct in refusing to accept the notice. That he was well aware that it must have been a notice warning him to appear when the appeal was heard is clear from his affidavit accompanying his application for rescission of the default judgment where he stated that after the case was heard in the Chief's Court Plaintiff intimated that he was going to appeal and paid R1 for the submission of " reasons for judgment " by the Chief.

The Commissioner who had the advantage of observing the witnesses had no hesitation in rejecting Defendant's evidence that Plaintiff and his witness had not visited his kraal and in fact Mr. White accepted that they had.

The application for condonation of the late noting of the appeal is refused with costs.

Craig and Otte, members, concurred.

For Appellant: Mr. W. E. White.

For Respondent: In default.

NORTH-EASTERN BANTU APPEAL COURT.

MAZIBUKO v. KUMALO.

B.A.C. CASE No. 32 OF 1968.

Pietermaritzburg: 16 September 1968, before Yates, President, Craig and Reibeling, Members.

BANTU LAW.

CHIEFS' COURTS.

SPOLIATION.

Claim as recorded in Chief's court stands—no amplification—spoliatory actions.

Summary: Plaintiff sued in a Chief's Court for two head of cattle which had been attached at his instance in settlement of a judgment which had been awarded him in that court and which had been handed to him by the Messenger and which, subsequently, were taken from his possession without his knowledge or consent by the Defendant. At the trial his claim was upheld in the Chief's court. On appeal in the Bantu Affairs Commissioner's court Plaintiff put forward no claim to ownership, but related how he had gained possession. Defedant claimed that the cattle were his property and not that of the judgment debtor. The Bantu Affairs Commissioner treated the action as spoliatory and confirmed the Chief's judgment.

Held: That while it is doubtful that spoliatory actions as such are known to Bantu Law the Commissioner did not err, in the circumstances disclosed in the instant case, in treating it as one.

Rules referred to:

Chiefs' and Headmen's Civil Courts (G.N. 2082 of 1967). Rule 8 (*a*).

Works referred to:

"Civil Practice of the Magistrates' Courts" by Jones and Buckle, 6th Edition.

Appeal from the Court of the Bantu Affairs Commissioner, Estcourt.

Yates (President):—

This case emanated from a Chief's Court where Plaintiff (now Respondent) obtained judgment for the return of two head of cattle. Plaintiff's claim as recorded in that court reads as follows "Plaintiff wants his beasts which were received from Mchitwayo Hadebe. They were at Khumalo's kraal two beasts". Defendant's (now Respondent) plea is recorded as "Khumalo denies any knowledge of the beasts". The particulars of claim were not amplified when the appeal was heard so that it must stand as recorded—see cases cited in Warner's Digest of S.A. Native Civil Case Law at paragraph 270 and *Ntuli v. Mkonza* 1964 N.A.C. 97 (N.E.) at p. 99, but a plea was filed denying that defendant was in possession of any cattle belonging to Mchitwayo Hadebe and putting Plaintiff to the proof thereof.

The appeal to the Court of the Bantu Affairs Commissioner was dismissed with costs and against this judgment defendant has appealed on the grounds:—

"1. That the judgment is against the evidence and the weight of the evidence.

2. That the learned Bantu Affairs Commissioner erred in upholding the Chief's Judgment in that—

(*a*) the Chief's Court Summons is vague and embarrassing and discloses no cause of action;

(*b*) the Chief's Court Summons and Chief's Reasons for Judgment do not show under what title Plaintiff claims the cattle to be payable to him.

3. The learned Bantu Affairs Commissioner should have held that the Plaintiff failed to prove that the cattle belonged to Mchitwayo Hadebe or that Mchitwayo Hadebe has a claim to them."

It appears from the Chief's "reasons for judgment" that the present Plaintiff had obtained a judgment against one Hadebe for two head of cattle and that the two head now in question were attached in settlement of that judgment from the possession of Mgolodelwa Kumalo, the present Defendant, to whom they had been sisaed by Hadebe. Defendant subsequently re-possessed them. The Chief came to the conclusion that the cattle had belonged to Hadebe and gave judgment for Plaintiff accordingly. In the Commissioner's Court, however, Plaintiff's evidence merely established that the cattle had been delivered to him by the Messenger of the Chief's Court in settlement of his judgment against Hadebe and that subsequently, without his permission or consent they were removed to Defendant's kraal and that he wanted them back.

Defendant claimed them as his but led no other evidence in regard to ownership. The Commissioner treated the case as one based on spoliation and while there is considerable doubt as to whether spoliatory actions are known to Bantu Law the Commissioner was not shown to have been wrong in dealing with the matter as he did. The evidence established that Defendant had taken the law into his own hands and this cannot be allowed. The maintenance of law and order is infinitely more important than the mere rights of particular individuals to recover possession of their property and the courts will summarily restore the status *quo ante* as a preliminary to any inquiry into the merits of the dispute. See Civil Practice of the Magistrates' Court by Jones and Buckle 6th Ed. at p. 89.

In addition the Defendant had his remedy for section 8 (2) of the rules for Chief's and Headmen's Civil Courts published in G.N. No. 2082 of 1967, provides hat "Any claim to property attached in the manner provided in subrule (1), made by any person other than the judgment debtor, shall be heard and determined by the Chief who delivered the judgment resulting in such attachment or by his successor in office."

Mr. Combrink contended that spoliation had not been established. He conceded that the cattle were in the peaceful possession of Plaintiff but argued that he had not been forcibly dispossessed. However it is clear from the evidence that as a result of Defendant's efforts the cattle were returned to him without Plaintiff's permission or consent.

The Defendant had no right to take the cattle from Plaintiff without a court order. The appeal is dismissed with costs and Defendant, if he wishes, may institute action against the Plaintiff and attempt to prove his claim to them.

Craig and Reibeling, members, concurred.

Appearances:

For Appellant: Adv. J. H. Combrink.

For Respondent: Adv. N. M. Fuller.

NORTH-EASTERN BANTU APPEAL COURT.

JEREMIAH MABASO v. MIRIAM MABASO.

B.A.C. CASE No. 34 OF 1968.

Durban: 26 August 1968, Before Yates, President, Craig and Warner, Members of the Court.

BANTU LAW.

SUCCESSION.

Succession under Bantu Law—property rights of spouses—civil marriage—Natal Law No. 46 of 1887—female appointed as heir.

Summary: Applicant and Respondent are son and mother respectively and the latter was married to her late husband, who died intestate, by civil rites under Natal Law No. 46 of 1887. According to this law the property rights of spouses are governed by Bantu Law. Respondent purported to renounce his heirship in favour of applicant and she was thereafter declared by the Bantu Affairs Commissioner to be the heir according to Bantu Law of her late husband.

Held: That under Bantu Law a Bantu female cannot be the heir to an estate.

Held: That Respondent's appointment as heir must be set aside.

Laws referred to:

Administration and Distribution of Bantu Estates—Government Notice No. 1664 of 1929.

Administration and Distribution of Bantu Estates—Government Notice No. R. 34 of 7 January 1966.

Natal Code of Bantu Law sections 28 (1), 109, 114.

Natal Law No. 46 of 1887. Section 11.

Cases referred to:

Xakaxa vs. Mkize d.a. 1947 N.A.C. (T. & N.) 84.

Sibiya vs. Sibiya 1 N.A.C. (N.E.D.) 61 (1948).

Works referred to:

"Principles of Native Law and the Natal Code" by Stafford and Franklin.

Appeal from the Court of the Bantu Affairs Commissioner, Pinetown.

Yates, President:

This is an appeal in terms of regulation 3 (5) of the regulations published in Government Notice No. R. 34 of 1966, against the decision of the Bantu Affairs Commissioner Pinetown on 8 September 1953, determining that Miriam Ngenge Mabaso (born Mkize) is the heir according to Bantu Law and custom to the estate of the late Johannes Mabaso.

The first matter to be considered is an application for condonation of the late noting of the appeal. In the circumstances of this case, which will appear from what follows, applicant was permitted to argue the merits of the appeal pending a decision as to whether or not his application should be granted.

According to the Applicant's affidavit which accompanied his application and other papers filed of record it appears that his mother, the respondent, married his father the late Johannes Mabaso by Christian rites on 23 February 1922. The latter died on 15 November 1946, leaving a widow, the Respondent, and two sons, Applicant then aged 16 years and Joseph aged 14 years. In his estate were three immovable properties of a total value of R600 and on 31 November 1946, Applicant was declared heir to his late father's estate by the Bantu Affairs Commissioner after an enquiry had been held in terms of regulation 3 (2) contained in Government Notice No. 1664 of 1929, which has now been substituted by Government Notice No. R. 34 of 1966. In 1953, after Applicant had come of age, his mother, with his consent, was emancipated in terms of section 28 (1) of the Natal Code of Bantu Law and she was declared heir to the estate of her late husband, the Applicant having abandoned his claim thereto and having ceded all his rights, title and claim to the estate to his mother who then took transfer of the immovable property. Subsequently in 1966, trouble arose between the parties and Respondent obtained an ejectment order against her son and, according to Applicant's affidavit, that was the first time he became aware that he was not the owner of the property. He appealed against the ejection order but without success. He has now appealed against his mother's appointment as heir to his father's estate on the grounds that—

> "(i) it was not competent in law for the learned Bantu Affairs Commissioner to entertain the application for the appointment of Miriam Mgenge Mabaso (born Mkize) as heir according to Bantu Law and Custom to the estate of the late Johannes Mabaso, or to declare or determine her to be heir as aforesaid, particularly because there was no compliance with the proper procedure and no notice was given to the Applicant of the said application.
>
> (ii) the learned Bantu Affairs Commissioner in any event erred in declaring or determining the said Miriam Mgenge Mabaso (born Mkize), to be the heir as aforesaid, because a female can never be heir according to Bantu Law and Custom."

As pointed out by Mr. Law, Respondent and her husband were married by Christian rites in 1922, so that the consequences of the marriage are determined by section 11 of Natal Law, No. 46 of 1887. The effect of this is that the property rights of the spouses are governed by Bantu Law. See *Xakaxa v. Mkize* d/a 1947 N.A.C. (T. & N.) 84 at page 86, *Sibiya v. Sibiya* 1. N.A.C. (N.E.D.) 61 (1948) and the "Natal Code of Bantu Law by Stafford and Franklin at pages 199 and 311. The devolution of the estate to the Applicant and his appointment as heir according to Bantu Law was therefore correct and the estate vested in him immediately his father died. Furthermore under that system a woman can never succeed to a deceased estate (see sections 109 and 114 of the Natal Code).

Mr. Noren contended that because Applicant had surrendered his rights to the estate in favour of his mother and as she had been emancipated in terms of section 28 (1) of the Code she was entitled to be appointed as heir in his place but in view of what has been said above it is clear that under Bantu Law only a male can inherit an intestate estate.

There is however nothing to prevent Applicant from donating any part of his inheritance to his mother and, being emancipated, she is entitled to own property, as was conceded by Mr. Law; but, not having original jurisdiction, this court is not called upon to decide whether or not the cession of rights signed by Applicant amounted to a donation.

Mr. Noren also contended that having ceded his rights Applicant was estopped from contesting the appointment of anyone else as heir to the estate but as pointed out by Mr. Law once

Applicant was appointed as heir the property became his and no longer formed part of an estate so that there were no inheritance rights to cede and any attempt to do so was a nullity.

Mr. Noren opposed the granting of condonation of the late noting of the appeal pointing out that Applicant had aequiesced in the appointment of his mother as heir for 13 years. However in this regard the question whether he was justified or not in taking no action until 1966 when there was trouble between himself and his mother will depend on the decision as to the terms of the agreement between them leading to the renunciation by Applicant of his rights. It is clear that since the issue of the summons for his ejectment from the property applicant has not delayed in his attempts to regain possession of the property.

Furthermore Mr. Noren pointed out that it was at Applicant's own request that Respondent had taken transfer of the properties and he argued that even if her appointment as heir was illegal nevertheless substantial justice has been done. It is not the function of this court to decide whether that is so or not; and whether or not Respondent is entitled to the property again appears to depend on the terms of the agreement between the two parties and the only way in which the matter can be resolved is by granting the application for condonation of the late noting of the appeal and by setting aside the appointment of Respondent as heir.

From the papers as submitted to this court is seems a fair inference that the Bantu Affairs Commissioner, the attorney acting for the parties and the parties themselves were satisfied that the legal aspect was in order and that it was the intention of the parties that Respondent should take transfer and become the owner of the properties.

The long delay in querying Respondent's appointment as heir is due to no fault of hers and in the circumstances it is equitable that she should not be mulcted in costs.

The appeal is allowed and the appointment of Respondent as heir to the estate of the late Johannes Mabaso is set aside. Applicant to pay the costs.

Craig and Warner, Members, concurred.

Appearances:

For Appellant: Adv. B. Law.

For Respondent: Adv. D. Noren.

NORTH-EASTERN BANTU APPEAL COURT.

MSOMI v. MSOMI.

B.A.C. No. 41 OF 1968

Durban: 27 August 1968: Before Yates, President and Craig and Warner, Members of the Court.

CUSTODY.

Christian rites marriage—custody of children—administration of intestate estate—Bantu Law heir—systems of law applicable—interests of children—*locus standi* of mother of the children—affidavits—evidence—costs.

Summary: One Amon Msomi married twice and his eldest son of the first marriage was appointed heir *ab intestato* under Bantu Law. The second marriage after the death of the first wife, produced three children and after Amon's death the heir now Respondent, took possession of the estate and of the children. The mother, now Applicant, sought a court order for the handing over of custody to her and the Commissioner applied Bantu Law and refused her application.

Held: That a mother in a civil marriage should have a say regarding the custody of her children.

Held: That common law falls to be applied in determining the custody of the minor issue of a civil marriage.

Held: That the administration of the estate has nothing to do with the custody of the children.

Held: That the interests of the children must be considered.

Held: That the question of custody is of such importance that it could not be decided on the affidavits filed and that evidence should be led.

Laws referred to:

Bantu Administration Act No. 38 of 1927. Section 11 (1).

Cases referred to:

Mbuli v. Mehlomakulu 1961 N.A.C. (S) 68.

Mathenyane v. Mathenyane & ano. 1954 N.A.C. (C) 66.

Nombida v. Flaman 1956 N.A.C. (S) 108.

Appeal from the court of the Bantu Affairs Commissioner, Pinetown.

Yates (President):

Applicant (now Appellant) applied to the Court of the Bantu Affairs Commissioner for an order that Respondent should deliver to her the custody of her three children David, Miriam and Steven aged about 12, 11 and 7 years respectively, together with her furniture and certain costs which she had incurred in trying to regain possession thereof. She also asked for a monthly allowance from the estate of her late husband to maintain the children. She alleged in her supporting affidavit that the three children were born of her marriage by Christian rites which took place on 20 June 1955, to her late husband Amon Msomi who died on 7 July 1966. Her husband died intestate and the Respondent, who was his eldest child by a previous marriage and a major was appointed heir to his estate according to Bantu Law. The latter took possession of his late father's estate and all the furniture which was acquired during the subsistence of her marriage with the deceased and removed the children.

In his replying affidavit the Respondent raised the question of Applicant's right to make the application alleging that she had no *locus standi* to do so and that she was not assisted by a guardian. He claimed further that having been declared the sole heir and representative of the estate he, by operation of Bantu Law, automatically become guardian of the Applicant and her children.

The Commissioner upheld this contention and discharged the rule *nisi* he had granted. Against this judgment Applicant has appealed on the grounds that:—

"1. The learned Assistant Bantu Affairs Commissioner erred in holding that the Applicant had no *locus standi in judicio.*

2. The Court should have found that the action by the applicant was based on Common Law and that her status was as that of woman under Common Law.

3. The Court should have found that the Applicant as the mother of the children has the primary claim for their custody and can act in their interest without the guardian's assisted (sic) particularly where the guardian is the opposing person."

The Applicant then applied for and was granted an interdict ordering that the children should remain in her custody pending the outcome of the appeal and the respondent was ordered to deposit the estate money with the Bantu Affairs Commissioner. Furthermore a *curator ad litem* was appointed to assist the Applicant.

Respondent then appealed against this judgment on the grounds that:—

"1. The appointment of a curator ad litem to the applicant on the 18 August 1967, failed to cure the incompetence of the application as set down for hearing.

2. The Bantu Commissioner erred in granting the relief sought on the information available to him.

3. The Order relating to moneys was incompetent as it was common cause that the Appellant was the heir to the estate of his late father and was entitled to proceeds of the Estate."

The first matter to be considered is whether or not the Commissioner was correct in applying Bantu Law for if he was then his ruling in regard to Respondent's rights is correct but if not then different principles apply.

The Commissioner based his decision on the fact that Applicant stated in her affidavit supporting her application for custody of the children that her late husband died intestate and that Respondent was appointed as heir "which is correct according to Bantu Law". However the administration of the estate has nothing whatever to do with the custody of the children so that Applicant's admission does not imply that she agreed that the custody issue should also be decided according to that system of law.

In the circumstances of this case the following excerpt from the judgment in the case of *Mbuli v. Mehlomakulu* 1961 N.A.C. (S) 68 at p. 71 is apposite:—

"As we are here concerned with the custody of a child it seems to me that the question of the application of common law or Bantu law and custom falls to be decided not solely on the basis of which legal system it would in all the circumstances of the case be fairest to give effect to as between the parties but that the dictates of public policy fall to be borne in mind in the light of the first proviso to section 11 (1) of the Native Administration Act, 1927, which precludes the application of Bantu law when it is contrary to the principle of public policy or natural justice. This aspect gives rise to the question whether it would be in the best interests of the child to award the guardianship and custody to the Plaintiff or to the Defendant".

See also *Mathenyane v. Mathenyane & Koee.* 1954 N.A.C. (C) 66.

A step-brother in the ordinary course of events under common law would have no claim whatever to the custody of his half-brothers and sisters and there would have to be good reasons for depriving a mother of the care and control of her own children where her husband was dead. Public policy further dictates that the mother should have a say regarding the custody of her children and if Bantu law were applied here she sould

be deprived of this right. In my view, therefore, the Commissioner was wrong in applying Bantu law and should have applied Common law. See also the case of *Nombida v. Flaman* 1956 N.A.C. (S) 108 at p. 109, and the authorities there cited to the effect that both this court and the Southern Bantu Appeal Court have held that the Common Law falls to be applied in determining the question of custody of minor children which are the issue of a civil marriage. The appeal will therefore be allowed with costs.

The Applicant has furnished no details in her affidavit as to where or how she proposes to look after the children while she is working nor is it clear whether respondent is married or what facilities he can provide for the care of the children. The question of maintenance and the provision of funds for this purpose must also be considered. In my view this is too important a matter to be decided on affidavit and the judgment of the Commissioner should be set aside and the case remitted to that court for the hearing of evidence and a fresh judgment in the light thereof.

In the result the appeal is allowed with costs. The judgment of the Commissioner's Court is set aside. The case is returned to that court for the hearing of evidence and a fresh judgment.

In view of this decision it follows that the Commissioner's second interim order granting custody of the children to the Applicant pending the outcome of the main appeal is correct and should not be disturbed.

Mr. Johnstone asked that the costs in regard to this appeal should be reserved pending the outcome of the case but there seems to me to be no justification for departing from the normal procedure of costs being awarded to the successful party, particularly bearing in mind that Respondent has all along opposed applicant in this matter. Both appeals were heard *pari passu* and in respect of the same facts so that the extra costs involved should be minimal.

The second appeal is dismissed with costs.

Craig and Warner, members, concurred.

Appearances:

For Appellant: Adv. B. Law.

For Respondent: Adv. R. N. Johnstone.

NORTH-EASTERN BANTU APPEAL COURT.

MBATA v. MVELASE.

B.A.C. CASE No. 74 OF 1968.

Pietermaritzburg: 17 September 1968. Before Yates, President and Craig and Reibeling, members.

BANTU LAW.

Communal fine—imposition by tribal "ibandhla".

Summary: A tribal "ibandhla" decided that if faction fighting broke out in its area a beast would be attached from each kraalhead in that area irrespective of whether he or his took part in the fight or not. A beast was attached from Plaintiff on the strength of this decision.

Held: That the "ibandhla" had no authority to impose the penalty.

Cases referred to:

Hlongwane and Ano. vs. Nomatamadlala 1965 *N.A.C.* 57 (N.E.).

Laws referred to:

Bantu Administration Act No. 38 of 1927, Section 11.

Natal Bantu Code (Proclamation No. R. 185 of 1967), Sections 6 (1). 7 (2). 18.

Proclamation No. 232 of 1932.

Government Notice No. 110 of 1957.

Appeal from the court of the Bantu Affairs Commissioner, Msinga.

Yates (President):

The first matter to be considered here is an application for condonation of the late noting of the appeal. Judgment was given on 2 May 1968, and according to the affidavit in support of the application a request for a written judgment was despatched by post on the same day. This was not furnished by the Add. Bantu Affairs Commissioner until the 4th June. The notice of appeal was drawn up and sent by post on 11 June 1968, and the appeal noted on the 12th. It was therefore out of time but there was nothing to prevent the appeal from being noted timeously in general terms pending the receipt of the Commissioner's "Reasons for judgment". See *Hlongwane and Ano. vs. Nomatamadlala* 1965 N.A.C. 57 (N.E.) and the authorities cited therein. However, as it appears that the Applicant was not satisfied with the judgment and immediately after the conclusion of the hearing instructed his attorney to note an appeal he should not be penalised for the latter's fault and furthermore as there is a prospect of success on appeal the late noting was condoned.

This is an appeal from the judgment of an Additional Bantu Affairs Commissioner granting absolution from the instance in a case in which Plaintiff (now Appellant) sued Defendant (now Respondent) for the return of a red ox or its value R60 which he alleged Defendant had had seized in 1964, purporting to act in his official capacity as a duly appointed tribal chief. He also claimed damages of R20 for deprivation of the use of the beast and costs.

The two grounds of appeal on which Appellant relied are:—

"1. The learned Bantu Affairs Commissioner erred in finding that Plaintiff took part in faction fighting.

2. The learned Bantu Affairs Commissioner erred in finding that the ibandla, in the absence of a properly constituted Tribal Authority has the power to impose a general 'fine' on the members of the tribe."

In regard to the first ground of appeal there is no admissible evidence whatever that Plaintiff took part in fact on fighting. Defendant stated that he had received reports to this effect but could not swear that Plaintiff did take part in the fight and conceded that the latter had not appeared in court i.e. had not been charged criminally. It is surprising that hearsay evidence in this regard should have been accepted.

According to defendant a tribal ibandhla had been called which decided that if faction fighting broke out a beast would be attached from each person in that area irrespective of whether he took part in the fight or not. A fight did take place and Defendant stated that thereafter a beast was attached from each kraalhaed in the area, and was in the nature of a fine for having taken

part in a fight. He also stated under cross-examination that cattle were not taken from Christians who took no part in the fight nor from some heathen kraalheads of whom the tribal constables were afraid so that the penalty was not uniformly enforced.

As pointed out by Mr. Menge section 11 of the Bantu Administration Act. No. 38 of 1927, provides that Bantu custom may be enforced provided it is not opposed to the principles of public policy or natural justice and to impose a communal fine *prior* to an offence which could include persons who had done their best to prevent an outbreak of violence clearly falls within this category. Provision is made in certain cases for the Supreme Chief i.e. the State President to impose a community fine vide section 6 (1) and 7 (2) of the Natal Code contained in Proclamation No. R. 195 of 1967. Proclamation No. 232 of 1932, also enables a Bantu Affairs Commissioner to whom an affray, faction fight or other disorder has been reported to hold a summary enquiry and if he is unable to determine the particular kraal or kraals concerned he may then fix responsibility and recover compensation on the basis of collective responsibility; but no such power is vested in Chiefs or Headmen. See G.N. No. 110 of 1957. Section 18 of the Natal Code requires Chiefs and Headmen to disperse rioters and where a state of lawlessness or unrest exists they may order that certain acts may be prohibited but only where their instructions are disobeyed may a fine not exceeding R4 be imposed.

Clearly Chiefs and Headmen have no authority to impose a collective fine nor is there any provision anywhere granting such authority to a tribal ibandhla. Even Bantu Affairs Commissioners are not empowered to impose a penalty in advance.

The appeal is allowed with costs. The judgment of the Bantu Affairs Commissioner's Court is set aside and for it is substituted "Judgment for plaintiff as prayed with costs".

Craig and Reibeling, members, concurred.

Appearances:

For Appellant: Adv. W. O. H. Menge i.b. Van Rooyen & Forder, Greytown.

For Respondent: In person.

NORTH-EASTERN BANTU APPEAL COURT

FANIE MAHLANGU vs. MAGRIETA NHLAPO.

B.A.C. CASE No. 64 OF 1968.

PRETORIA: 24th October, 1968. Before Yates, President, and Craig and Strydom, Members of the Court.

BANTU LAW AND CUSTOM CUSTODY

Custody of children—customary union—father's right—fit and proper person—interests of children.

Summary: Plaintiff sued his ex-wife after the dissolution of their customary union for delivery to him of the children of such union and was awarded judgment.

Held: That Plaintiff was entitled to the custody of the children as there was nothing to indicate that he was not a fit and proper person to have the care of them or that it was not in their interests to be taken from their mother.

Cases referred to:

Kabe and Inganga vs. Inganga, 1954, N.A.C. (C) 220.

Works referred to:

"Native Law in South Africa", 2nd edition, by Seymour.

Appeal from the court of the Bantu Affairs Commissioner, Bethal.

Yates, President:

This is an appeal from the judgment of a Bantu Affairs Commissioner for Plaintiff (now Respondent) for the return of five children, with costs. Plaintiff sued Defendant (now Appellant) duly assisted by her father for the return of their five children born of a customary union entered into by them in about 1952. He alleged that Defendant deserted him and in January 1965 he sued Defendant's father for the return of lobolo and was granted judgment.

Defendant admitted the customary union and the birth of the five children but denied having deserted Plaintiff and alleged constructive desertion on his part. Both parties led evidence in an endeavour to prove who was responsible for the break up of the customary union. The Commissioner found as a fact that Plaintiff had assaulted the Defendant but that this took place sometime prior to her desertion and accepted that Defendant maliciously deserted the Plaintiff. He awarded custody of the children to the latter.

A lengthy appeal has been noted, the details of which are not necessary to repeat, setting out reasons why the judgment is considered to be against the weight of evidence and the probabilities of the case.

That Bantu law and custom were applied is clear from the penultimate paragraph of the Commissioner's "reasons for judgment" in which he stated—

> "Volgens Bantoe gewoonte en gebruike in hierdie geweste is die man geregtig op die teruglewering van sy lobolo beeste sowel as enige kinders wat uit die huwelik gebore is indien sy vrou hom kwaadwilliglik verlaat."

and there has been no suggestion that he was wrong in doing so.

Bantu law in regard to the guardianship of children born of a customary union is settled. The father is the lawful guardian and is entitled as of right to the custody of his children and

may only be deprived thereof where it is shown that he is not a fit and proper person to have the care of them or where, owing to their tender age it would not be in their interest to live apart from their mother vide *Kabe* and *Inganga* v. *Inganga,* 1954, N.A.C. (C) 220 and "Native Law in S.A." by Seymour, 2nd Ed., at page 150 and the authorities there eited.

Mr Langley contended that the interests of the children was paramount; that in the instant case, apart from very meagre evidenee, that question had not been investigated and from a perusal of the "Reasons for Judgment" it was elear that the Commissioner had not eonsidered that aspeet at all and therefore this eourt as "Upper Guardian" should do so. He pointed out that if the father was entitled as of right to the eustody of the children then the present proeeedings were unneeessary and a waste of time and money. He also eontended that at some stage the eare of the children had been entrusted to defendant and the onus was therefore on Plaintiff to show good cause why the position should be altered.

Mr Fourie eoneeded that the eare of the ehildren may at some stage have been entrusted to the mother but pointed out that there is no evidenee that this was anything but an administrative arrangement and the present proceedings were the first time that the matter had been considered judieially.

As indieated above a father is entitled to the custody of his children and the onus is therefore on defendant to allege and prove that he is not a fit and proper person to look after them or that for some other reason it is not in the interest of the ehildren that he should exereise guardianship over them. As pointed out by Mr Fourie, nowhere in the pleadings or in evidenee was Plaintiff's suitability to look after the ehildren or their interest put in issue or questioned, nor was the point raised in the notiee of appeal so that this eourt is preeluded from eonsidering it. Further there is nothing in the record to indieate any obvious injustiee whieh would justify this eourt in exercising its powers as "Upper Guardian" and altering the judgment.

The appeal is dismissed with eosts.

Craig and Strydom. Members, eoneurred.

For Appellant: Adv. T. Langley.

For Respondent: Mr J. S. Fourie.

CENTRAL BANTU APPEAL COURT

MHLANGU vs. NGWENYA, N.O.

ROLL No. 3 OF 1968

JOHANNESBURG: 6 June and 1 July 1968. Before Potgieter, President, and Thorpe and Van Wezel, Members.

MUNICIPAL LOCATION

Sale of rights of occupation and improvements on a stand owned by a municipality.

Summary: Plaintiff paid Defendant R150 for the rights of occupation and improvements possessed by the latter in respeet of a stand owner by a municipality. The Plaintiff took oeeupation illegally. An alleged eondition that this sale was subject to the approval of the Superintendent was not proved. The Superintendent never approved and when he beeame aware of the illegal oeeupation he required the Plaintiff to vaeate. The Defendant had in the meantime, without informing the Superintendent of the sale, surrendered to the

Municipality his rights to the stand. The Plaintiff sued the Defendant, in effect, for a refund of the purchase price of R150, alternatively for payment of a similar amount as damages for unjust enrichment.

Held: As the Plaintiff had not proved the alleged condition, he had not proved that the contract was legal and therefore he could not rely on it as a basis for refund of the purchase price.

Held, further: The Plaintiff had not proved that he had suffered loss as the result of the transaction and so could not succeed on the alternative claim.

The judgment of the court *a quo* of absolution from the instance, with costs, confirmed.

Cases referred to:

Jajbhay v. *Cassim,* 1939, A.D. 537.

Works of reference:

Hoffman's "S.A. Law of Evidence" (1963 edition).

Appeal from the Court of the Bantu Affairs Commissioner, Springs.

Thorpe, Permanent Member:—

The Defendant in the court *a quo* was originally William Ngwenya. but he died during the course of the proceedings, apparently after the close of pleadings and before the hearing of evidence commenced. His widow. Lenkie Ngwenya, in her capacity as the representative of his estate, was then substituted as the Defendant.

The Appellant sued William Ngwenya on particulars of claim reading, as amended:—

1. The parties are Natives.
2. During or about 1962 the Defendant sold the rights of occupation (to?) Stand 759, Payneville Location, and the improvements thereon to Plaintiff for the sum of R150 and which sum Plaintiff duly paid to the Defendant.
3. The said sale was subject to the confirmation of the Superintendent of the Payneville Location.
4. The Defendant failed to obtain the approval of the said Superintendent to the said sale but terminated his (Defendant's) rights to occupy the said site.
5. Defendant is thus unlawfully enriched at the expense of the Plaintiff and/or has acted in breach of the agreement aforesaid.
6. Notwithstanding due demand Defendant wrongfully fails tc pay.

Wherefore Plaintiff prays for judgment against the Defendant in the sum of R150 with costs.

Neither William nor Lenkie Ngwenya pleaded to the first paragraph of the particulars of claim, but the Appellant testified that he and "the Defendant" were "both" Bantu. Lenkie Ngwenya had by that time been substituted as the Defendant, so the Appellant's reference to "the Defendant" is not clear. If either William or Lenkie Ngwenya were not Bantu, the court *a quo* would not have had jurisdiction to hear the case. See *Sachs N.O. and Malope v. Mdhluli* 1956 N.A.C. 43. However, it seems that the Court *a quo* was satisfied that all concerned were Bantu and it will be assumed that this is indeed the position.

Lenkie Ngwenya apparently adopted the plea of her late husband. In terms thereof the contents of paragraph 2 of the particulars of claim were admitted. The rest of the plea is not a model of consistency, but at least it is clear that all other material allegations in the particulars of claim were denied.

The Appellant called the Superintendent of Payneville as his only witness. He thereafter testified himself and closed his case.

The Respondent's attorney applied for absolution from the instance and this was granted, with costs.

Against this judgment the Appellant appeals to us on the following grounds:—

A. That the said judgment is bad in law in that—

(i) the Court omitted to take cognizance of the fact that the cause of action was based on a contract of purchase and sale, which was common cause;

(ii) the Court should have found that the rights sold, were not transferred to appellant and appellant was unable to acquire and enjoy the said rights in perpetuity;

(iii) the Court should therefore, have found that Appellant was entitled to a refund of the purchase price paid;

(iv) the Court erred in considering factors which were not relevant to the transaction and which were not pleaded.

B. The said judgment is against the evidence and weight of evidence.

C. The full grounds will be furnished when a copy of the evidence is received.

No other or fuller grounds of appeal have been furnished.

From the evidence adduced it appears that William Ngwenya became the site permit holder of Stand 759 in 1955, and it was endorsed to the effect that he could use the site for storage purposes only. William Ngwenya had also accepted the condition that he demolish existing improvements. He was given permission to erect a temporary wood and iron garage for storage purposes, which structure would remain his property and which he could remove.

In about December 1961, the Appellant bought from William Ngwenya "everything that was there (on the Stand) and the rights to occupy", according to the Appellant's evidence.

It appears that "everything" included two rooms in which "Ngwenya's people" were living. They vacated and the Appellant moved in. He made further improvements (without the approval that should have been obtained from the Superintendent) and also erected a storeroom. Appellant lived on the stand from about December 1961, until about August 1964. During this period he paid rent of R1.85 per month to the Municipality in William Ngwenya's name. He would give the money to the latter, who would pay it to the Municipality.

The Superintendent did not know of the arrangement between the Appellant and William Ngwenya and was not aware of the Appellant's occupation of the site until July 1964, when he found him residing there, as he testified, illegally.

On the 21st August 1964, William Ngwenya elected voluntarily to remove to Kwa Thema, another locality in Springs, and this necessitated his surrendering the rights under his site permit for Stand 759 to the Town Council of Springs. This he did without informing the Superintendent that he had purported to sell these rights to the Appellant. He received no compensation as he was not entitled to any.

The Appellant "owned" Stand 236, Payneville, and on the 24th August 1964, he was warned by the Superintendent that if he did not return to Stand 236 his rights to occupy the latter stand would be terminated. The Appellant complied, but up to the time he and the Superintendent gave evidence on the 14th December 1967, he was still using Stand 759 for storage purposes, as he had been since December 1961, though he had not paid any rent after August 1964. Apparently the Superintendent was permitting the Appellant storage facilities because "the issue" was before the court *a quo*. This is, however, not a valid reason for making a concession, because no decision of the court *a quo* or of this Court would affect the Superintendent's power to enforce the regulations.

The Appellant valued the buildings which he found on Stand 759 when he took it over at R80. These buildings he demolished. Presumably he appropriated the materials to his own use.

From the frame of the particulars of claim it appears that the Appellant is relying on the two following causes of action, in the alternative, and the appeal was argued before us on that basis.

The first is that there was a contract of purchase and sale, subject to the Superintendent's confirmation, and that the price was paid, but that through the seller's fault the confirmation had not been obtained; furthermore, the seller by his own action had made delivery impossible.

The second cause of action is that R150 had been paid and no *quid pro quo* had been received i.e. that William Ngwenya had been enriched at Appellant's expense.

As to the main cause of action, it is common cause that there was a contract of purchase and sale. But to be able to rely on it the Appellant had to prove his allegation that it was subject to the Superintendent's confirmation.

The Superintendent mentioned in evidence Administrator's Notice 853 of 1955 as containing the regulations applicable to this Stand. From these regulations it is clear that no one may occupy a particular stand unless the Superintendent has first approved of such occupation. For anyone to purport to buy such a right otherwise than subject to the approval of the Superintendent is clearly illegal.

There is no evidence of such a condition. It is true that the Appellant testified:—

> "I did propose to Defendant that we have the Stand transferred but he said he was sick. He said that after his recovery we would go to the Superintendent."

As there is no evidence to the contrary, it must be assumed that this proposal was made, but it does not prove a condition of sale. The Appellant does not give the date of the proposal, and it may have been an afterthought, which occurred long after the transaction.

The probabilities of there ever having been such a condition do not favour the Appellant. He remained in occupation from December 1961, to August 1964, without taking any steps to obtain transfer. As pointed out by Mr Helman, who appeared before us on behalf of the Appellant, the Appellant and William Ngwenya must have been in easy reach of each other, as their shops were adjacent. There is no evidence that William Ngwenya was ill continuously throughout the period December 1961 to August 1964, and in the absence of such evidence it cannot be assumed that it was impossible for the Appellant to take William Ngwenya to the Superintendent's Office, if indeed William Ngwenya was delaying on purpose. It is, presumably, in that office that William Ngwenya surrendered his rights to the Town Council in August 1964.

From the facts that the Appellant occupied Stand 759 illegally and erected buildings without approval, it would appear that he was not much concerned over compliance with regulations. It seems probable that he would have gone on occupying Stand 759 indefinitely, without ever trying to obtain transfer, had it not been that his illegal occupation came to light due to William Ngwenya's decision to remove to Kwa Thema.

Mr Helman submitted that the maxim *omnia praesumuntur rite esse acta* applies and that it must be presumed that the parties had agreed that the sale was subject to the Suprintendent's approval. But this maxim relates merely to proof of *formal* validity. See Hoffman "South African Law of Evidence" (1963) at page 92. It cannot be invoked to prove a condition of sale.

Judgment for Appellant on the alleged breach of contract could be considered only if the contract were legal and this has not been proved.

To succeed on the alternative cause of action, the onus was on the Appellant to prove that the Defendant had been enriched at his expense. As pointed out by the Commissioner who tried the case, the Appellant himself testified that he had stored goods on Stand 759 from December 1961, to August 1964, and that this was worth R6 per month to him, less the R1.85 per month rental paid to the Municipality; in fact, he says that he continued to store goods there after the latter date, apparently continuously up to the time he gave evidence on the 14th December 1967. He had also converted to his own use the materials in buildings he had found on the Stand when he took over and he valued these buildings at R80. In addition, he had occupied the Stand personally for 33 months. It is true that he had put up other buildings, but this he had done unlawfully, and he cannot sue the Defendant for any loss resulting from his having to demolish them later; furthermore, no loss has been proved.

It should perhaps be noted that, even if the contract were illegal, the Appellant would appear to be entitled to recover to the extent, if any, that William Ngwenya had been enriched at his expense, in view of the interpretation in *Jajbhay vs. Cassim*, 1939, A.D. 537, of the *in pari delicto* rule. There seems to be no consideration of public policy prohibiting a relaxation of the rule in the present case. However, the Appellant has not shown that William Ngwenya benefited more from the transaction that he did i.e. that William Ngwenya was enriched at his expense, and it is therefore not necessary to decide this point.

In the result, I am of the opinion that the judgment of absolution pronounced by the Court *a quo* is correct and that the appeal should be dismissed with costs.

Potgieter, President, and Van Wezel, Permanent Member Concurred.

For Appellant: Mr Henry Helman, Johannesburg.

For Respondent: Adv H. Barolsky, instructed by Panovka, Cooper and Platt, Springs.

CENTRAL BANTU APPEAL COURT

RADEBE vs. RADEBE.

ROLL No. 5 OF 1968

JOHANNESBURG: 7 June 1968. Before Potgieter, President, and Thorpe and Van Wezel, Members.

HUSBAND AND WIFE

Husband and wife—Divorce—Order for division of the property unsuccessful attempt by a party to obtain agreement on division—appointment by Court of receiver and liquidator—not necessary if sufficient evidence before Court to enable it to effect a division.

Summary: A decree of divorce contained an order that there be a division of the joint estate, but the present defendant remained in possession thereof. The Plaintiff sued for the appointment of a certain attorney as receiver and liquidator to effect the division. The Defendant pleaded that the plaintiff had not discussed division with him, that it would not be in the interests of the estate to appoint a receiver and that the person nominated for appointment was unsuitable. The Plaintiff testified that the Defendant had refused to give her what she asked for and it appeared that she may have demanded more than half the assets. At the close of the Plaintiff's case the court *a quo* granted absolution on the grounds that the Plaintiff had not made a genuine attempt to obtain agreement on a division. Up to that stage there had been no indication that the Defendant had made any proposals about a division, but it appeared that the defence would attempt to prove that the estate was bankrupt.

Held: That the Plaintiff had made out a *prima facie* case, that the judgment of absolution should be set aside and the case remitted for a fresh judgment after the Defendant had presented his case.

Cases referred to:

Gates v. *Gates,* 1940. N.P.D. 361.

Appeal from the Court of the Bantu Affairs Commissioner, Johannesburg.

Potgieter, President:

In the Court *a quo* the Plaintiff (now Appellant) sued the Defendant (now Respondent) for the appointment of Mr B. A. S. Smits as receiver and liquidator of the assets of the joint estate of Plaintiff and Defendant with the necessary authority and powers to give effect to the order by the Central Bantu Divorce Court dated 25 September 1964, for a division of the joint estate.

In reply to the plaintiff's claim, the defendant pleaded:

(a) it is denied that any attempt has been made by Plaintiff to discuss a division;

(b) it would not be in the interests of the estate to have a receiver and liquidator appointed;

(c) that the said B. A. S. Smits would not be a proper person to be appointed as a liquidator of the said estate as the said person has been acting for the Plaintiff for many years and is hostile to the Defendant; and further

(d) that the Court should not appoint a receiver in this instance.

After hearing Plaintiff's evidence the Commissioner on the application of the Respondent's attorney granted absolution from the instance with costs.

Against this judgment the Plaintiff has come to this Court on appeal on the grounds set out in the notice of Appeal.

Plaintiff, armed with a Divorce Court Order, has come on appeal for a division of the joint estate as at the date of the divorce when the community of property subsisting between the parties ceased to exist. Her submission is that when the divorce was granted there were assets in the joint estate, including a house, and in pursuance of the Court's Order she was entitled to a half share in the estate, having been married in community of property.

In her summons and evidence she contended that—

(i) she had since the divorce in 1964 tried to discuss a division with her ex-husband, but he had refused to have anything to do with her;

(ii) with six children to look after she should be given the house as she has paid some of the instalments on it;

(iii) she is not aware of any debts outstanding as at the date of the divorce;

(iv) as her ex-husband refuses to negotiate with her on a division, she had no alternative but to come to Court for assistance and to ask for the appointment of a receiver and liquidator to liquidate and divide the estate;

(v) she wishes to nominate Mr B. A. S. Smits, her attorney, for appointment.

The Defendant first called for further particulars and then pleaded—

ad paragraphs (i) and (ii) admitted;

ad paragraph (iii) defendant denied that the parties could not agree on a division and that any attempt has been made to discuss a division of the assets and that it will be in the interest of the estate to have a receiver and liquidator appointed.

ad paragraph (iv) defendant denied that Mr B. A. S. Smits would be a proper person to be appointed as Liquidator of the estate and states that the said person has been acting as the attorney for the Plaintiff for many years against the Defendant and is hostile to the defendant.

Defendant further states that the appointment of a receiver is a matter in the discretion of the Court and the Court should not appoint a receiver in this instance.

Two averments by the defendant in his plea, if more clearly put, could have done much to clear the air in regard to the issues before the Court. Instead the issues were clouded. These averments were—

(i) "Defendant denies that it will be in the interest of the estate to have a receiver and liquidator appointed", and

(ii) "the Court should not appoint a receiver in this instance," though the Defendant admitted that the Court had a discretion in the matter.

As the Defendant did not give evidence this Court is in the dark as to—

(i) "why it would not be in the interest of the estate to appoint a receiver" and

(ii) "why not in this instance."

The Plaintiff gave her evidence and, although she was not always consistent in her replies, she persisted in saying that her husband refused to discuss the matter with her; he was trying to sell the common home; they could not agree as to the division; there is an Order by the Divorce Court that a division must take place; and she wants the Court to come to her assistance and appoint a receiver and liquidator to receive and liquidate the estate. In her evidence she lays claim to almost the whole estate, amongst others the house. From the record it would appear that Defendant had the use and was in possession of the whole estate since the divorce. It stands to reason that the Plaintiff now wants the pendulum to swing in her favour. His pleadings indicate that Defendant was indifferent as to whether a division ever took place or not. His attitude seems to have been "possession is nine points of the Law."

At the hearing the attorneys for both parties at the start first addressed the Court but from the record it is not clear for what purpose.

At page 10 of the record an entry appears by the Commissioner "Mr Sacks objects to these questions," but this Court could find no indication on the record whether the Commissioner sustained or rejected the objection. These omissions in the record, no matter how slight, are to be regretted and should be avoided if possible. Both parties quoted the case of *Gates vs. Gates* 1940 N.P.D. 361 as a case in point, and an important aspect was decided per Selke, J. I quote "Held further, that it is unnecessary for the Court to appoint a receiver because, upon the evidence as to the contributions by the respective spouses, the Court was able to decide how the estate should be divided . . ."

The appointment of a receiver and liquidator, it would seem becomes unnecessary, if the Court finds that—

(i) the parties have agreed as to the division, or

(ii) the Court itself can decide how the estate should be divided, or

(iii) it is proved to the satisfaction of the Court that there are in fact no assets in the estate. This, however, is a matter of proof and the Court must call upon the parties to place the facts before it.

It would appear to be trite law that if one of the conditions mentioned above does not exist, the party coming to Court for relief is entitled to ask the Court in the absence of an agreement between the parties, to appoint a receiver and liquidator to receive and divide the estate as ordered by the Court.

In the present case the Plaintiff stated in evidence that she had tried at least once to discuss the division with her ex-husband. Although, as was said before, she was not always consistent in giving her evidence, this averment had not been disproved. There is no evidence on record, either, that there were no assets in the estate, although, from the nature of the questions put in cross-examination and to which it would appear an objection was raised but not decided, the Defendant attempted to prove that that was the case. But without evidence by the Defendant this line of defence was unsuccessful. The Court *mero motu* apparently did not offer to assist in arriving at a division.

For four years the Plaintiff has waited or tried to obtain finality in the matter but without success—what else can she do but to come to Court and say—"please help me. I have tried and failed?" It is clear from the record that the Defendant is not interested. The fact that Plaintiff nominated her attorney for the post should not have been a deciding factor in the Court *a quo* as the Commissioner, once he had decided to appoint a receiver could, if he was satisfied that Plaintiff's nominee was not the proper person to be appointed, have asked the parties to submit names for appointment of persons acceptable to both sides.

The judicial officer, hearing the case, in his reasons for judgment and facts found proved, seemed to have based his judgment solely or mainly on the fact that he was not satisfied that the Plaintiff on her part, had made an "adequate, proper, genuine or serious attempt with a view to effecting a division of the joint estate," and continued "Plaintiff approached defendant on one occasion only in connection with a division of the joint estate." In his reasons for judgment he deals at length with Plaintiff's apparent lack of *bona fides* by claiming more out of the estate than she was entitled to and states "It (the Court) was also satisfied that the present action is not a genuine attempt to bring about a division, but has as its objective, the granting of the house ownership or possession to Plaintiff." Let us assume for a moment this is the case—what difference does it make to the liquidation of the joint estate? Plaintiff can only get half of the estate as at the date of divorce after the debts of the joint estate as at that date have been paid, nothing more and nothing less. Why must all attempts to discuss and divide come from the one party only? Why should Defendant not be called upon to say what steps he has taken to effect a division of the estate, the community of which ceased automatically on a divorce being granted?

In the view of this Court the Commissioner misdirected himself in granting an absolution judgment at the end of Plaintiff's case, without calling upon the Defendant to state what he has done to obtain finality in the matter.

This Court is satisfied that too much stress had been placed by the Commissioner on only one aspect of the Plaintiff's prayer, namely her desire to try and get out of the joint estate as much as possible and her failure to make a "genuine attempt," and lost sight of the fact that no matter what else is being asked for the parties are entitled to come to Court if they say they cannot agree, to have the dispute between them settled in accordance with the Divorce Court's Order.

The appeal is upheld with costs. The judgment of absolution by the Court *a quo* is hereby set aside.

The case is remitted to the Court *a quo* for hearing of Respondent's case and thereafter to deliver judgment.

Thorpe, and Van Wezel, Permanent Members, concurred.

For Appellant: Adv. S. W. Sapire, instructed by C. M. Sacks, Johannesburg.

For Respondent: Mr Henry Helman (of Henry Helman, Johannesburg).

NORTH-EASTERN BANTU APPEAL COURT

MOTSEPE vs. MOTSEPE and SWATLANG.

B.A.C. CASE No. 73 OF 1968.

PRETORIA: 25 October 1968. Before Yates, President, and Craig and Strydom, Members of the Court.

PRACTICE AND PROCEDURE

Applications in respect of appeals—Bantu Appeal Court—Rule No. 14.

Summary: An application for condonation of the late noting of an appeal was lodged during the morning of the day on which the appeal session commenced.

Held: That the requirements of Rule 14 of Government Notice R. 2084 of 1967 that an application in respect of an appeal must be lodged in quadruplicate at least 24 hours before the commencement of an appeal session are peremptory.

Cases referred to:

Tauzeni vs. Tsoki, 1964, N.A.C. (S) 92.

Mantshi & ano. vs. Ngqaqu, 1956, N.A.C. (S) 61.

Tsengiwe & ano. vs. Xaba, 1956, N.A.C. (S) 61.

Works referred to:

"A Digest of S.A. Native Civil Case Law" by Warner.

Rules referred to:

Government Notice 2887 of 1951.

Government Notice R. 2084 of 1967, Rule 14.

Appeal from the court of the Bantu Affairs Commissioner, Pretoria.

Craig (Permanent Member):—

It is unnecessary to discuss the merits of an appeal lodged by Plaintiff (now Appellant) against a judgment in favour of the Defendants (now Respondents).

The appeal was noted late vide Bantu Appeal Court Rules 2 and 4 and the case of *Tauzeni vs. Tsoki,* 1964, N.A.C. 92 (S) and an application purporting to be in terms of Bantu Appeal Court Rule 14 was lodged with the Registrar of this court on 24 October 1968 which was the date on which the present session of the court commenced vide Government Notice 576 of 1968 dated 13 September 1968.

The latest at which the application could have been lodged was immediately before 9.30 a.m. on 23 October 1968.

Attention is directed to the judgments in the cases of *Mantshi & ano. vs. Ngqagu,* 1956, N.A.C 61 (S) and *Tsengiwe & ano. vs. Xaba,* 1956, N.A.C. 61 (S) which are summarised by Warner in his "A Digest of S.A. Native Civil Case Law" at paragraph 415. Government Notice 2887 of 1951 referred to in those judgments has been replaced by Government Notice R. 2084 of 1967 dated 29 December 1967 and the requirements of Rule 14 in the latter rules are identical with those in the similarly-numbered rule of the former.

This court lays down that the requirements of Rule 14 of Government Notice R. 2084 of 1967 that an application in respect of an appeal shall be filed in quadruplicate with the Registrar or with the Clerk of the Bantu Affairs Commissioner's Court at the centre where the session of the Bantu Appeal Court is to be held not less than 24 hours before the commencement of the session are peremptory and must be complied with strictly. Bantu Appeal Court Rule 27 is of no assistance to a defaulting party in such circumstances.

The notice of appeal was defective in that it showed no "just cause" vide Bantu Appeal Court Rule 4 and, in fact, made no reference whatever to the merits of the case [See Warner's "Digest" (*supra*) at paragraph 432].

In the light of the circumstances outlined above the court held that the appeal was not properly before it and it was struck off the roll with costs.

Yates, President and Strydom, Member, concurred.

For Appellant: Adv. D. P. Kent i.b. McRobert, De Villiers & Hitge.

For Respondent: Mr A. P. Nel.

CENTRAL BANTU APPEAL COURT

MOSHOESHOE and HLONGWANE v. BANTU AFFAIRS COMMSSIONER, SPRINGS and TOWNSHIP MANAGER, CITY COUNCL OF SPRINGS.

ROLL No. 12 OF 1968

JOHANNESBURG: 3 and 18 October 1968. Before Potgieter, President, Thorpe and Van Wezel, Members.

ESTATES

Government Notice R. 34 *dated* 7 *January* 1966—*Jurisdiction of Bantu Affairs Commissioners—distinction between decisions under regulations* 3 (2) *and* 3 (3)—*decision under regulation* 3 (2) *not appealable—manner of conducting an enquiry under regulation* 3 (3).

Summary: On the strength of an unsworn document signed by an alleged grandson of a deceased Bantu and of an affidavit by an alleged daughter of the deceased, an Assistant Bantu Affairs Commissioner issued a certificate "appointing" the grandson heir to the deceased. Two women afterwards disputed the correctness of this decision and noted an appeal. Though the appeal was noted late no application for condonation had been filed in terms of Bantu Appeal Court Rule 14. Furthermore the person who had been "appointed" heir had not been cited as Respondent in the notice of appeal nor had a copy thereof been served upon him.

Held: That the appeal should be struck off the roll as it had not been properly noted.

Held, further: That the decision in question was in any event not appealable.

Cases referred to:

Mzimela and others vs. Mzimela 1960 N.A.C. 80 (N.E.). *Zuka vs. Zuka* 1956 N.A.C. 162.

Works of Reference:

Warner's "Digest of S.A. Native Civil Case Law" sections 67 to 96.

Statutes etc. referred to:

Government Notice R. 34 dated 7th January 1966. Government Notice 1664 of 1929.

Appeal from the Assistant Bantu Affairs Commissioner, Springs.

Thorpe, Permanent Member:—

On the 3rd October 1968, Mr B. A. Dlamini, attorney, appeared before us on behalf of the appellants. He stated that the appeal had been noted late, but that an application for condonation of the late noting had been filed with the clerk of the court at Springs. The application had not reached us. The application had been incorrectly filed, as in terms of Bantu Appeal Court Rule 14 any application in connection with an appeal to be heard before this court in Johannesburg must be filed with the registrar (or, in his absence, with the clerk of the Bantu Affairs Commissioner's Court, Johannesburg), not less than 24 hours before the commencement of the session. It seemed that Mr Dlamini was unaware of this rule, and this court must express its concern at the failure of an attorney to acquaint himself with the rules of the court before which he appears. After Mr Dlamini had been given an opportunity to read the rule he applied for a postponement. The request was refused on the grounds that, apart from there being no application for condonation before

us, there were other reasons why the appeal should not be heard. The matter was struck off the roll and the Court intimated that full reasons would be furnished later. They are as follows.

This matter came before as by virtue of a "Notice of Appeal" dated the 30th March 1968. It reads as follows:—

"In the matter between ELIZABETH MOSHOESHOE, ETHEL HLONGWANE, Appellants, and BANTU AFFAIRS COMMISSIONER, SPRINGS, 1st Respondent, THE TOWNSHIP MANAGER, CITY COUNCIL OF SPRINGS, 2nd Respondent.

NOTICE OF APPEAL

Be pleased to take notice that Appellants hereby appeal against the decision of the learned Bantu Affairs Commissioner, Springs, made on the 20th July 1967, in the absence of record on the following grounds:—

1. That the learned Bantu Affairs Commissioner erred in his decision by declaring RICHARD HLABATHI as the heir of the estates late Johannes Hlongwane and Jacob Hlongwane in the absence of evidence *aliunde*.

2. That the learned Bantu Affairs Commissioner erred in not finding that the Appellants were the only surviving children in the above estates, respectively.

3. That the learned Bantu Affairs Commissioner erred in not holding a family meeting prior to the appointment of the said RICHARD HLABATHI."

What the Appellants mean by "in the absence of record" is obscure, but for the purposes of this judgment it will not be necessary to consider this point.

The proceedings of the 20th July 1967, consist of two documents. The first is a partially completed roneoed form which reads:

"N1/4/3—17/67

ESTATE OF THE LATE JACOB HLONGWANE ID. No. ..... RICHARD HLABATHI ..... ID. No. 180620 duly sworn states:

1. I am the (relationship) Grandson of the abovenamed who died on 27/5/58 at Springs.
2. Deceased was a widower.
3. Marriage Certificate No. ..... dated ..... at ..... produced shows that deceased was married in/out of community of property.
4. Deceased died intestate.
5. Is survived by the following persons:—
   (a) Children:
      1. Johannes (died 1941)
      2. Joshua (died 1954)
      3. Joseph (died 1966).
      4. Solomon (died 1944)
      5. Flora born 1914
      6. Elizabeth born 1922
   (b) Parents:
      Father ..... deceased.
      Mother ..... deceased.
   (c) Brothers: deceased.
   (d) Paternal uncle: deceased.

Witness: (signed) H. Bezuidenhout. (signed) Richard Nhlabati. Signature/right thumb print.

Deponent acknowledges that he/she is aware of the contents of the above statement and was signed and sworn to in my presence on this ..... day of .....

Assistant Bantu Affairs Commissioner: Springs".
19..... (unsigned)

It is noted that the Deponent signed his surname as "Nhlabati", but as his surname appears in all other parts of the record as "Hlabathi" the latter will be adopted in this judgment.

There are notes in paragraph 5 (a) of this document which are obviously not part of the Deponent's statement and which were probably added after the 20th July 1967. Thus, opposite "Johannes", "Joshua", "Flora" and "Elizabeth" appear respectively. "Married", "Married". "Not a daughter" and " — do —". Under "Elizabeth" the following words have been inserted, "Ethel Hlongwane—Only living child (False)". It is to be deprecated that an original document has been tampered with.

The second document is one dated the 19th June 1967, and is an affidavit by Florah Mdhluli. It reads as follows:—

"TOBI FLORA MDLULI (born HLONGWANE) ID. No. 1060356 hereby make oath and say:—

I am the daughter of Jacob Hlongwane. My father died on the 27th May 1958. I married Richard Mdluli in 1930. My husband died during June 1955. I had four brothers and one sister.

Johannes Hlongwane died 1956.

Josua Hlongwane died, I am not sure of the date.

Joseph Hlongwane died 1966.

Solomon Hlongwane died 1946.

Wilhelmina Elizabeth is married to Jeremiah Moshoeshoe.

Johannes Hlongwane had one son his name is Richard Hlabathi. Johannes was married to Alzina Hlabathi and divorced in 1933. The reason why Richard's surname is Hlabathi and not Hlongwane is because he lived with his mother and took her surname.

Richard Hlabathi and Richard Hlongwane is one and the same person.

(Signed) Florah Mdhluli."

On the strength of these two documents the Assistant Bantu Affairs Commissioner (hereinafter referred to as the Assistant Commissioner) granted a certificate that Richard Hlabati "is appointed heir" in the estate of the late Jacob Hlongwane (allegedly his grandfather).

The notice of appeal was referred to the Assistant Commissioner who had granted the certificate. He did not furnish a written statement in terms of Bantu Appeal Court Rule 9 (1) as he should have done, though he did make some comments in a letter.

It is not clear that the Assistant Commissioner had jurisdiction to make any finding affecting distribution of property in the estate of the late Jacob Hlongwane. In terms of regulations 2 and 3 of the regulations for the administration and distribution of the estates of deceased Bantu promulgated in Government Notice R. 34 dated the 7th January 1966, whether a Commis-

sioner has jurisdiction depends on the nature of the property in question and this he must ascertain at the very outset. Assuming that there is no will, the position as to jurisdiction would appear to be as follows:—

(i) In terms of regulation 2 (a), if the property is movable and the deceased was ordinarily resident in any territory outside the Republic other than Portuguese East Africa, the Commissioner's powers are limited to paying claims due.

(ii) In terms of the first paragraph of regulation 2 read with regulation 3 (2), if the property falls within the purview of sections 23 (1) or (2) of Act 38 of 1927, as amended, only the Commissioner of the district where that property is situated has jurisdiction. Those sections read as follows:—

> 23. (1) All movable property belonging to a Bantu and allotted by him or accruing under Bantu law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Bantu law and custom.
>
> (2) All land in a location held in individual tenure upon quitrent conditions by a Bantu shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).

(iii) In terms of regulation 3 (1), if the property falls within the purview of paragraphs (b), (c) or (d) of regulation 2, the property must devolve as if the deceased were a European and only the Commissioner within whose area of jurisdiction the deceased ordinarily resided shall give directions as to its distribution.

(iv) In terms of regulations 3 (2) and 3 (3) read with paragraph (e) of regulation 2, where the property does not fall within the purview of (i), (ii) or (iii) above, the property shall be distributed according to Bantu law and custom and the Commissioner who must give directions as to its distribution is, in the case of immovable property, the Commissioner in whose area of jurisdiction the property is situated, or, in the case of movable property, the Commissioner in whose area of jurisdiction the deceased ordinarily resided. See also section 23 (4) of Act 38 of 1927.

There is no indication on the record up to the date of the finding appealed against as to the nature of the property involved or where it was situated or, indeed, whether there was any property whatever. Nor is it stated where the deceased ordinarily resided.

There are other unsatisfactory features about the proceedings leading to the "appointment" made on the 20th July 1967. For example: (a) the man "appointed" heir did not say at that stage that he claimed to be heir, (b) it is not stated whether the deceased was married, and, if so, whether by civil rites or Bantu custom; (c) if it was intended to certify that Richard Hlabati was the heir according to Bantu custom, it is not clear how this decision was arrived at as it is not apparent, for instance, that his late father was the eldest son and heir of the deceased.

However, whether the Assistant Commissioner had jurisdiction, and whatever the merits or demerits of the proceedings in question, the finding made on the 20th July 1967, is not appealable because the Assistant Commissioner was not at that time aware of any dispute or question and did not purport to resolve one. At most, the certificate was issued in terms of regulation 3 (2), which provides that in certain circumstances a Bantu Affairs

Commissioner may call before him any person who may be able to furnish information in regard to the proper distribution of property "and after hearing such persons as he may consider necessary shall give such directions in regard to the distribution of such property as shall seem to him fit .....".

There is no provision for an appeal against an order made in terms of regulation 3 (2). Appeals are dealt with in regulation 3 (5) and in terms thereof the only finding against which an appeal lies is one made under regulation 3 (3), that is, a finding made as the result of an enquiry into a dispute. See also section 23 (4) of Act 38 of 1927.

Though the 1966 Government Notice referred to above repeals Government Notice 1664 of 1929, as amended by Government Notices 716 of 1939, 1171 of 1939 and 939 of 1947, it should be noted they are essentially *in pari materia,* and that the decisions based on the provisions of the earlier Government notice are equally applicable to the corresponding provisions of the later one. Guidance can be sought from the decisions referred to in sections 67 to 96 inclusive of Warner's well-known "Digest of South African Native Civil Law", 1961 edition, and in section 2 of the 1958-1962 supplement thereto.

It should be noted particularly that a determination in terms of regulation 3 (2) of Government Notice 1664 of 1929 did not preclude a further inquiry being held in terms of regulation 3 (3) where a dispute arose. *Mzimela and others* v. *Mzimela* 1960 N.A.C. 80 (N.E.). Regulations 3 (2) and 3 (3) of the 1966 Government notice are identical to those two regulations, respectively, and this decision therefore applies to these later regulations.

A further reason why the appeal should be struck off the roll is that the true respondent is Richard Hlabathi and he was not cited in the notice of appeal or served with a copy thereof. How the Bantu Affairs Commissioner, Springs, and the Township Manager, City Council of Springs, neither of whom were parties to the proceedings in question, could be cited as respondents in this appeal is past comprehension. If these two officials had been parties, this Court would not have jurisdiction to hear the appeal.

Sufficient has been said to show why the appeal should be struck off the roll, but it is noted that the Assistant Commissioner who gave the finding of the 20th July 1967, is of the opinion that, although his was not an enquiry under regulation 3 (3), the proceedings conducted by another Commissioner on the 5th February 1968, did constitute such an enquiry and that the latter's finding, confirming the earlier finding, as appealable. It would indeed be regrettable if this opinion were acted upon and a further fruitless appeal lodged, because the later proceedings also did *not* constitute an enquiry under regulation 3 (3). In the interests of expediting a conclusion to the dispute that has arisen some further observations are indicated.

I shall quote the record of the proceedings of the 5th February 1968, and indicate in what way it falls short of an enquiry under regulation 3 (3). The record relating to that date reads as follows:

"Op 5/2/68 is teenwoordig:

Tolk, Bantoekonstabel N. Nkosi, Richard Hlabathi, 180620. Wilhelmina Elizabeth Moshoeshoe—born Hlongwane Ethel Hlongwane—daughter of the deceased. According to her she is the only living child of the deceased. No will was executed. Att. Dlamini was/is her attorney. Attitude one of aggressiveness and open abuse. Instructed to leave the office. According to Richard Hlabathi, Ethel is the daughter of Elizabeth Moshoeshoe who is the daughter of the deceased, Jacob. He claims to be the heir in this estate.

According to Elizabeth she is not a daughter of the deceased. She is a daughter of the late Johannes. He apparently had one wife. She does not know Richard. She was told to find a male relative by a previous Bantu Affairs Commissioner during 1954. Her grandfather Jacob, the deceased, told her to find a male relative. This was necessary so that a male could stay with them. She found and fetched Richard. My grandfather said I had to fetch him as he was their relative. He did not stay with us. We just had to write him down. I don't know who his father was. Her grandfather only told her that he was a relative. Her grandfather had only one stand No. 1820. Stand 1545 belonged to Johannes, her father. His estate was not administered by this office. (No letters of donation or marriage certificate available.)

Note.—Advised Richard to hold a family discussion."

It will be observed that no finding was recorded, though there is in the record a copy of a letter dated the 5th February 1968. (the same date as that on which the last proceedings took place). This letter was addressed to Mr Dlamini, the appellants' attorney, and was apparently signed by the Commissioner. It read:

"re: ESTATE LATE JACOB HLONGWANE

Referring to your letter of the 23rd January 1968, I wish to inform you that after consulting your clients today I am satisfied that from observations made by me the appointment of Richard Hlabathi as heir in the abovementioned estate on the 20th July 1967, is in order and that there is nothing I can do further in this matter."

Apart from the facts that the disputants and the nature of the property and its location are not clearly identified or defined, the disputants were not afforded an opportunity to call witnesses or to cross-examine witnesses adverse to them.

It is essential that they be given this opportunity, as indicated in the sections of Warner already referred to. Although some latitude is permissible, an enquiry under regulation 3 (3) should be conducted generally in the same way as judicial proceedings and a full record should be kept, especially as any finding is subject to appeal. Records of estate enquiries should further disclose whether they are being held in terms of regulation 3 (2) or 3 (3). The Commissioner who conducted the proceedings on the 5th February did not purport to hold a formal enquiry and the record shows that the proceedings were no more than an inconclusive interview.

It may be of assistance to observe that an enquiry under regulation 3 (3) is competent only where the property in question has to be distributed according to Bantu law and custom, and this means that an enquiry is usually directed only at ascertaining the male heir according to that system of law.

It is open to the appellants to enforce their rights, if any, by way of ordinary civil action and this is so even though they may base their claim on Bantu law and custom. *Zuka* v. *Zuka* 1956 N.A.C. 162.

To recapitulate: (a) the appeal was noted late and no application for condonation is before us, (b) the finding in question was not made as the result of an enquiry under regulation 3 (3) and is therefore not appealable, and (c) the true respondent was not cited in the notice of appeal and a copy of the notice was not served on him.

For these reasons the appeal was struck off the roll.

Potgieter, President and Van Wezel, Permanent Member, concurred.

For Appellant: Mr B. A. Dlamini, Johannesburg.

For Respondents: No appearance.

NORTH-EASTERN BANTU APPEAL COURT

ISAAC NGCOBO vs. MISTER BUTHELEZI.

B.A.C. CASE No. 79 OF 1968

DURBAN: 10 December 1968, Before Yates, President and Craig and Addison, Members of the Court.

DEFAMATION
PRACTICE AND PROCEDURE

Defamation—Nature of statement—Reasons for judgment—requirements.

Summary: Defendant accused Plaintiff of carrying on a love affair with the former's wife. The trial court ruled that the words were not defamatory and gave inadequate reasons for doing so.

Held: That the words were defamatory.

Held: That a Bantu Affairs Commissioner's reasons for judgment are intended to assist the Court and must be prepared in compliance with the Rules and authorities.

Cases referred to:

Warner's "Digest of S.A. Native Civil Case Law" paragraphs 467-478.

Rules referred to:

Bantu Appeal Court—Rule 9.

Bantu Affairs Commissioner's Court—Rule 43 (6).

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

Yates (President):—

Plaintiff (now Appellant) sued Defendant (now Respondent) for damages of R150 for defamation alleging that—

"On or about the 17th April 1967, and at Kwa Mashu Township, Plaintiff, speaking to Babylon Radebe, uttered the following defamatory words of and concerning Plaintiff:—

"Mina ngiwumyeni walenkosikazi ethandana no Ngcobo" a translation whereof is as follows:—

"I am the husband of the woman with whom Ngcobo is carrying on a love-affair."

The said words are *per se* defamatory."

Defendant pleaded as follows:—

"Defendant partly admits that the words complained of were used but denies that he said Plaintiff was in love with Defendant's wife and puts Plaintiff to proof. Defendant avers that he never said that Plaintiff was in love with Defendant's wife but he admits that he did allege that Plaintiff was proposing love to Defendant's wife."

Defendant was in default on the day of trial and after hearing the evidence of Plaintiff and his witness Babylon Radebe to whom the words were uttered the Commissioner refused to grant a default judgment.

An appeal has been noted against his decision on the grounds that:—

"The Learned Bantu Affairs Commissioner erred in holding that it is not defamatory *per se* to say of a man that he is carrying on a love affair with another man's wife."

According to Babylon Radebe, the man to whom the statement was made, a translation of the words used by Defendant in Zulu was "I am the man whose wife is in love with Isaac Ngcobo" and had the matter rested there it is difficult to see how they could be construed as defamatory of Plaintiff for in that case there was no imputation against him. He could not be held responsible for the feelings and emotions of Defendant's wife. However Babylon went on to say "Butelezi meant that his wife is carrying on a love affair with Plaintiff" and that is also the import of the translation of the actual Zulu words contained in the summons and of the admission contained in Defendant's plea. Here the imputation is quite clearly that Plaintiff was active in carrying on an illicit love affair or being unduly intimate with Defendant's wife which would be clearly morally reprehensible. The allegation is therefore defamatory. The appeal is allowed with costs. The judgment of the Bantu Affairs Commissioner is set aside and the case returned to that Court for entry of default judgment against Defendant and the award of an appropriate amount as damages. See rule 43 (6) of the Rules for Bantu Affairs Commissioners' courts contained in Government Notice 2083 of 1967.

Craig, Permanent Member:—

I agree with the view of the learned President that the Commissioner erred in refusing a default judgment and that the case should be remitted for entry of such judgment with an appropriate award.

While not condemning the Commissioner's "Facts found proved" and "Reasons for judgment" in their entirety I must point out that they are intended, *inter alia,* to assist the Appeal Court. To say that "The Court after hearing argument and after considering the authorities mentioned *and other authorities besides* came to the conclusion . . ." without specifying or identifying such authorities is too vague to be of assistance to anybody.

The Commissioner's attention is directed, for future guidance, to Rule 9 of Government Notice R. 2084 of 29 December 1967 (Bantu Appeal Courts Rules) and to the decisions summarised by Warner in his "A Digest of S.A. Native Civil Case Law" at paragraphs 467-478.

Addison, member, concurred.

For Appellant: Mr D. Kali.

For Respondent: In default.

Bladwyser van Sake

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